(26,865)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 779.

ONEIDA NAVIGATION CORPORATION, CLAIMANT OF THE SAILING VESSEL "PERCY R. PYNE, 2D," &c., APPELLANT,

vs.

W. & S. JOB & COMPANY, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 10, 1919.

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1 To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel of James W. Smith and George U. Kirkpatrick, doing business under the firm name of Smith, Kirkpatrick & Co., against the sailing vessel "Percy R. Pyne 2nd", her tackle, apparel, etc., and against all persons lawfully intervening for their interest therein, in a cause of contract and damage, civil and maritime, alleges, upon information and belief, as follows:

First. Libelants are engaged in business under the said firm name of Smith, Kirkpatrick & Co. in the City of New York, and at the times hereinafter stated were the consignees and owners of the bales of wool hereinafter mentioned.

Second. At all the times hereinafter mentioned the "Percy R. Pyne 2nd" was, and now is, an American sailing vessel and is now within the port of New York and the jurisdiction of this Honorable Court.

Third. Prior to the 11th day of August, 1917, the said "Percy R. Pyne 2nd" received on board at Port Elizabeth, Africa, seven hundred and two (702) bales of wool in good order and condition, the property of and consigned to your libelants, which bales the master of the said vessel, in consideration of the freight paid therefor, agreed to carry from Port Elizabeth, Africa, to Boston, and there to deliver the same to libelants in like good order and condition.

Fourth. It was warranted and agreed by the master and
2 owners of the "Percy R. Pyne 2nd", in consideration of the said shipment and the freight payable thereon, that the said "Percy R. Pyne 2nd" was entirely seaworthy and in every way suitable and qualified for the intended voyage.

Fifth. On or about the 11th day of August, 1917, the "Percy R. Pyne 2nd" sailed from Port Elizabeth, Africa, and subsequently on or about the 1st day of October, 1917, arrived at Boston, where she discharged libelants' cargo. The said bales of wool, however, were not discharged and delivered in like good order and condition as they had been received on board, but were delivered in a wet and seriously damaged condition, in consequence of which their value was greatly impaired.

Sixth. The said "Percy R. Pyne 2nd", upon sailing from Port Elizabeth, was not seaworthy and in all respects suitable and qualified for the intended voyage, but, on the contrary, was unseaworthy and unsuitable for a voyage and for carriage of cargo of the character intended. Among other causes of unseaworthiness, she was inadequately and insecurely constructed and after her construction her strength had been greatly impaired by the cutting away of her timbers and frame for the installation of an auxiliary engine.

Seventh. By reason of the premises, libelants have sustained damage, as nearly as can be estimated at present, in the sum of Twenty thousand dollars ($20,000), no part of which has been paid, although duly demanded.

Eighth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the libelants pray that process may issue, in ac-
3 cordance with the practice of this Court in cases of admiralty and maritime jurisdiction, against the said vessel "Percy R. Pyne 2nd", her tackle, apparel, etc., and that all persons having or claiming any interest therein may be cited to appear and answer the matters aforesaid, and that libelants may have a decree for the damages sustained by them as aforesaid, together with interest and costs, and that the said vessel "Percy R. Pyne 2nd", her tackle, apparel, etc. may be condemned and sold to pay the same, and that libelants may have such other and further relief as may be just.

BARRY, WAINWRIGHT, THACHER & SYMMERS,
Proctors for Libelants, 59 Wall Street, New York City.

4 SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Jas. W. Smith, being duly sworn, deposes and says that he is a member of the firm of Smith, Kirkpatrick & Co., the libelants above named; that he has read the foregoing libel and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

JAS. W. SMITH.

Sworn to before me, this 28th day of December, 1917.
[SEAL.] WILLIAM H. WILSON, JR.,
Notary Public, Kings County, No. 189.
Kings County Register's No. 9056.

Certificate filed in New York County No. 241; New York County Register's No. 9201; Commission Expires March 30, 1919.

5 *Interrogatories Addressed to the Claimant Which Are Required to Be Answered in Writing and Under Oath.*

First Interrogatory. When, where and by whom was the "Percy R. Pyne 2nd" built?

Second Interrogatory. What alterations were made to the "Percy R. Pyne 2nd" for the installation of her auxiliary engine after she had been built? When, where and by whom were such alterations made?

Third Interrogatory. What voyage or voyages had the "Percy R. Pyne 2nd" made between the time of her construction and the time of her sailing from Port Elizabeth on August 11, 1917?

Fourth Interrogatory. What repairs were made to the "Percy R. Pyne 2nd" at Port Elizabeth or in any African port?

Fifth Interrogatory. After the arrival of the "Percy R. Pyne 2nd" at Boston, when did she make her next voyage, other than the voyage to New York, for the purpose of there effecting repairs?

Sixth Interrogatory. What repairs and /or/ alterations were ef-
at New York before the vessel undertook to proceed upon another

voyage? State in detail what such repairs and alterations were, by whom they were made, how long they took to complete and what the price charged for such repairs was.

Seventh Interrogatory. Have you made any claim or complaint against or to the original builders of the "Percy R. Pyne 2nd" either
6 that the original construction of the vessel was defective or that they were responsible in whole or in part for the cost of the repairs and alterations made by Tietjen & Lang? If you have written any letters to the builders presenting such claim or complaint, attach copies thereof to your answers to these interrogatories.

Eighth Interrogatory. Have you at any time brought any action or legal proceeding against the builders of the "Percy R. Pyne 2nd"?

7 [Endorsed:] Docket No. P. District Court of the United States, District of New *Jersey*. James W. Smith and George U. Kirkpatrick, doing business under the firm name of Smith, Kirkpatrick & Co., Libelants, against The Sailing Vessel "Percy R. Pyne 2nd", her tackle, apparel, etc. Copy. Libel. Barry, Wainwright, Thacher & Symmers, Proctors for libelants, 59 Wall Street, Borough of Manhattan, City of New York.

8 To the Honorable Judges of the United States District Court for the Southern District of New York:

The answer of Oneida Navigation Corporation, claimant, to the libel of James W. Smith and George U. Kirkpatrick, doing business under the firm name of Smith, Kirkpatrick & Co., against the sailing vessel "Percy R. Pyne, 2nd", her tackle, apparel, etc. in a cause of contract civil and maritime, alleges as follows:

First. It denies any knowledge or information sufficient to form a belief as to the matters alleged in the article of the Libel marked First.

Second. It admits the allegations alleged in Article of the Libel marked Second.

Third. It admits that prior to the 11th day of August, 1917 the "Percy R. Pyne, 2nd" received on board at Port Elizabeth certain bales said to contain wool and said to be in apparent good order and condition, certain of which bales were to be delivered at Boston, others at New York. It denies any knowledge or information sufficient to form a belief as to the other allegations contained in the article of the libel marked Third.

Fourth. It denies all the matters alleged in article of the libel marked Fourth.

Fifth. It admits that about the 11th day of August, 1917 the "Percy R. Pyne 2nd" sailed from Port Elizabeth, Africa and arrived at Boston on or about October 1st, 1917, where certain
9 of the cargo was discharged, including certain bales of wool received by libellants. Claimant is informed that certain of the bales delivered to libellants were slightly wet. It denies all the other matters alleged in article of the libel marked Fifth. It alleges upon information and belief that as no claim was made upon the claimant or the master of said vessel for damage to said goods, or

any notice given of any survey on said bales until long after the arrival of said goods, claimant has had no opportunity for verifying said claim of damage.

Sixth. It denies all the matters alleged in article of the libel marked Sixth.

Seventh. It denies the allegations contained in article of the libel marked Seventh, except it admits that no part of said claim has been paid.

Eighth. For a further defence and further answering the libel herein, the claimant alleges that on the voyage from Port Elizabeth to Boston and New York, and particularly while rounding the Cape of Good Hope, the "Percy R. Pyne 2nd" ran into terrific storms and mountainous seas, causing her to ship huge quantities of water, to pitch and roll violently, strain and heel over on her side, causing a small amount of sea water to be admitted into the vessel, which by the heeling over and excessive rolling of the vessel, was caused to splash at times above the dunnage and wet a small amount of the cargo, although it was duly removed by the pumps, soundings being taken and the pumps worked regularly. That whatever damage, if any, was caused to libellants' goods on the voyage was caused
10 by the Acts of God, perils and dangers of the seas or other navigable waters or the inherent defect, quality or vice of the thing carried or insufficiency of package, and that the owner of said vessel exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, and that in accordance with the Act of Congress of February 1893 known as the Harter Act and the terms of the bills of lading issued for said goods and under the general maritime law, neither the vessel nor her owners are responsible for any of the loss or damage claimed by libellants, and if said loss or damage was caused or contributed to in any way by any faults or errors in the management or navigation of said vessel, which is not admitted, neither the vessel nor her owners are in any way liable or responsible therefor. That the bills of lading for the bales of wool alleged by libellants to have been damaged contain the following clause:

"subject to terms and conditions of charter party"

for the voyage in question with Arkell & Douglas, Inc. and the charter party contains the following provisions:

"The said vessel is believed to be tight, staunch, strong and in every way fitted for such a voyage, and receive on board during the aforesaid voyage the merchandise hereinafter mentioned, and no goods or merchandise shall be laden on board otherwise than from the said party of the second part or their agent,"

and

"the dangers of the seas, navigation and errors and the negligence of master and crew of every nature always excepted"

and

"this charter is subject to all Acts of Congress of the U. S. ex-
11 empting vessel and owners from law for loses and /or/ damages."

That under the terms of the said charter party there was no warranty on behalf of the owner of the said vessel of her seaworthiness, and in no event is the owner nor the vessel to be held liable for any loss or damage to any goods other than those shipped by charterer or its agents. That the vessel was not a general carrier and that no liability under the general law for fault, errors or other acts of the vessel, master or crews was nor could be incurred. That whatever damage, if any, was caused to libellants' goods is not chargeable to the vessel or her owners for the reason that the said goods claimed to have been damaged were not owned and shipped by charterer or its agents.

Dated New York February 23rd, 1917.

HUNT, HILL & BETTS,
Proctors for Claimant, 120 Broadway, Borough of Manhattan, New York City, N. Y.

12 Southern District of New York.

STATE OF NEW YORK,
City of New York, County of New York, ss:

John W. Crandall, being duly sworn, deposes and says: That he is Secretary of Oneida Navigation Corporation, claimant named in the foregoing answer; that he has read the same and notes the contents thereof; that the matters therein alleged are true of his own knowledge; as to those matters stated to be alleged upon information and belief, he believes these latter to be true.

JOHN W. CRANDALL.

Sworn to before me this 25th day of February, 1918.

HENRY VICTOR CRAWFORD,
Notary Public, New York County No. 380.

Certificate filed in register's office, N. Y. county No. 8279.

13 United States District Court, Southern District of New York.

JAMES W. SMITH et al., Libellants,

against

The Sailing Vessel "PERCY R. PYNE, 2nd", etc., ONEIDA NAVIGATION CORPORATION, Claimant.

Interrogatories Addressed to Libellants.

First Interrogatory. In what respect were the bales of wool damaged and by what wet as set forth in paragraph "Fifth" of the libel?

Second Interrogatory. What were the number of bales so claimed to have been damaged and the marks upon each?

Third Interrogatory. What was the sound value of the bales of wool alleged to have been damaged?

Fourth Interrogatory. What was the damaged value of the bales

of wool claimed to have been damaged, and state in detail how such damage was fixed or determined?

Fifth Interrogatory. In what way was damage done to the bales of wool claimed to have been damaged?

14 Sixth Interrogatory. In what respects was the "Percy R. Pyne, 2nd" not seaworthy, suitable and qualified for the intended voyage?

Seventh Interrogatory. In what respects was the "Percy R. Pyne, 2nd" unseaworthy and unsuitable for the voyage from Port Elizabeth to Boston?

Eighth Interrogatory. In what respects was the vessel inadequately or insecurely constructed?

Ninth Interrogatory. How had the strength of the vessel been impaired by cutting her timbers? State what timbers are alleged to have been cut, when and by whom.

Tenth Interrogatory. When by and to whom, if anyone, on behalf of the ship was notice given as to damage alleged to have been done to bales of wool upon arrival of the port of discharge? Was such notice oral or in writing, if in writing, attach a copy, if oral, state substance.

Eleventh Interrogatory. In what respect were the said bales of wool not delivered in like order and condition in which they had been received on board?

HUNT, HILL & BETTS,
Proctors for Claimant.

15 U. S. District Court, Southern District of N. Y.

JAMES W. SMITH et al., Libellants,

against

The Sailing Vessel "PERCY R. PYNE 2nd", etc., ONEIDA NAVIGATION CORPORATION, Claimant.

Answers to Interrogatories. Attached to Libel.

Answer to First Interrogatory. 1916-1917 Camden, Maine R. L. Bean.

Answer to Second Interrogatory. Claimant knoweth not as to any alterations for installation of auxiliary engine, whether if any such were made they were prior to or after the construction of vessel. Claimant acquired vessel after construction and completion.

Answer to Third Interrogatory. None, except voyage from New York to South Africa.

Answer to Fourth Interrogatory. Vessel was cleaned down and recaulked, position of rudder corrected and iron bands fitted to stern and rudder posts and other wise placed in seaworthy condition.

16 Answer to Seventh Interrogatory. No.

Answer to Eighth Interrogatory. No.

ONEIDA NAVIGATION CORPORATION,
By JOHN W. CRANDALL,
Secretary.

Southern District of New York.

STATE OF NEW YORK,
City of New York, County of New York, ss:

John W. Crandall, being duly sworn, deposes and says: that he is Secretary of Oneida Navigation Corporation, claimant named in the foregoing answers to interrogatories; that he has read the same and knows the contents thereof; that the matters therein alleged are true of his own knowledge; as to those matters stated to be alleged upon information and belief, he believes these latter to be true.

JOHN W. CRANDALL.

Sworn to before me this 25th day of February, 1918.
HENRY VICTOR CRAWFORD,
Notary Public, New York County No. 380.

Certificate filed in register's office, N. Y. county No. 8279.

17 [Endorsed:] Office copy. U. S. District Court, Southern District of N. Y. James W. Smith, et al, Libellants, against The sailing vessel "Percy R. Pyne, 2nd", etc., Oneida Navigation Corporation, Claimant. Answer and Interrogatories. (Copy.) Hunt, Hill & Betts, Proctors for Claimant, Equitable Building, 120 Broadway, New York City. Received Feb. 26, 1918. B. W. T. & S. Harrington, Bigham & Englar, Feb. 26, '18. Copy received, 64 Wall St., N. Y.

18 To the Honorable the Judges of the District Court of the United States, for the Southern District of New York:

Petition of Oneida Navigation Corporation against W. & S. Job & Company, Inc., in a cause of contract and damage, civil and maritime, alleges upon information and belief as follows:

First. That your petitioner is and at all the times referred to in the libel herein was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and is the owner and claimant of the American Schooner "Percy R. Pyne, 2nd".

Second. Upon information and belief that the said W. & S. Job & Company, Inc., is and at all the times referred to in the libel herein, was a corporation duly organized and existing under and by virtue of the laws of the State of New York, with offices at No. 29 Broadway, Borough of Manhattan, New York City, and within this District.

Third. That heretofore and on or about the 30th day of August, 1916, said W. & S. Job & Co., Inc., then the owners of a certain contract with one R. L. Bean of Camden, Maine, for the construction of a schooner then in the course of construction, and owners of a certain contract with the Belinders Company for an engine for said vessel, entered into an agreement with one Anderson T. Herd,
of New York City, which agreement was on the same day
19 assigned by said Anderson T. Herd to Percy R. Pyne, 2nd, also of New York City, by which for an adequate consideration

therein expressed, it agreed to sell said vessel as constructed according to said certain contract and specifications referred to in said agreement, to the said Anderson T. Herd or Percy R. Pyne, 2nd, and further agreed to supervise the construction of said schooner for a valuable consideration, and to see that it was constructed according to the contract and specifications referred to therein (a copy of said agreement is attached hereto and marked A). Petitioner begs leave to refer to the original of said agreement and contract and specifications on the trial of this action.

Fourth. That on or about the 13th day of February, 1917, said agreement between W. and S. Job & Co., Inc., and Anderson T. Herd duly assigned to said Percy R. Pyne, 2nd, as alleged in article third of this petition, was for a valuable consideration duly assigned to the petitioner herein, the Oneida Navigation Corporation, by said Percy R. Pyne, 2nd, together with all his right, title and interest under said agreement.

Fifth. That the schooner so constructed under said agreement between W. and S. Job & Co., Inc., and Anderson T. Herd, and duly assigned as aforesaid, was delivered by said W. & S. Job & Co., Inc., to the petitioner on or about February 13, 1917, and was represented to have been constructed according to the terms of said agreement and the contracts and specifications referred to therein, and petitioner thereupon became the owner of said schooner.

20 That petitioner thereafter operated said schooner under the name of "Percy R. Pyne, 2nd."

Sixth. That thereafter the "Percy R. Pyne, 2nd", entered upon a voyage on the 11th day of August, 1917, between Port Elizabeth, South Africa, and Boston, Massachusettes, U. S. A., taking on board, among other articles, 702 bales of wool, said to have been the property of and consigned to James W. Smith and George U. Kirkpatrick, doing business under the firm name of Smith, Kirkpatrick & Company, consigned from Port Elizabeth, South Africa, to Boston, Massachusetts, U. S. A.

Seventh. That on or about the 3rd day of January, 1918, James W. Smith and George U. Kirkpatrick, doing business under the firm name of Smith, Kirkpatrick & Company, caused to be filed in the Office of the Clerk of the United States District Court, for the Southern District of New York, a libel against the schooner "Percy R. Pyne, 2nd", her tackle, apparel, etc., and against all persons lawfully intervening for their interest therein, in a cause of contract and damage, civil and maritime, which alleged, among other things, in substance, that the said "Percy R. Pyne, 2nd" received on board at Port Elizabeth, South Africa, 702 bales of wool belonging to the libellants in good order and condition, the property of and consigned to the libellants, which it agreed to carry from Port Elizabeth, South Africa, to Boston, and there deliver same to libellants in like good order and condition; that the said "Percy R. Pyne, 2nd" sailed from Port Elizabeth, South Africa, on or about August 11th, 1917, and arrived at Boston on or about October, 1, 1917,

21 where she discharged libellants' cargo in a wet and seriously damaged condition, in consequence of which its value was greatly impaired; that the said "Percy R. Pyne, 2nd" upon sailing

was unseaworthy and unsuitable for a voyage, the causes of her unseaworthiness being that she was faultily and insecurely constructed and because after her construction her strength had been greatly impaired by the cutting away of her timbers and frame for the installation of an auxiliary engine; that by virtue of said alleged damage to the cargo the libellants had been damaged to the extent of $20,000.

Eighth. That your petitioner thereafter appeared in said action and filed a claim to said schooner, as owner.

Ninth. That your petitioner denies any liability for the damages referred to in the said libel, and alleges among other things that said damages, if so caused, were occasioned by the fault of the said W. and S. Job & Company, Inc.

Tenth. That your petitioner filed its answer to said libel of James W. Smith and George U. Kirkpatrick, doing business under the firm name of Smith, Kirkpatrick & Company, on February 25th, 1918, and that on the 16th day of August, 1918, by order of Honorable John C. Knox, District Judge, leave was granted to your petitioner to petition in the firm of W. and S. Job & Company, Inc., as a party respondent in said action. Petitioner alleges that said W. and S. Job & Co., Inc., should be proceeded against in this same cause as parties respondent for the damages set forth in the libel.

22 Eleventh. That all and singular the premises of this petition are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your petitioner prays that citations may be issued according to the course and practice of this Honorable Court, to the end that said W. & S. Job & Company, Inc., may be proceeded against in this suit for the damages claimed by the libellants, as if said W. & S. Job & Company, Inc., had been originally proceeded against herein, and your petitioner prays that the said W. and S. Job & Company, Inc., be cited to appear and answer the libel herein, and this petition, and that this Court may be pleased to pronounce a decree against W. & S. Job & Company, Inc., for any damages which may be found due the libellants with interest and costs, and also the costs of your petitioner herein, and that your petitioner may have such other and further relief as to the Court may seem just.

ONEIDA NAVIGATION CORPORATION,
By GEORGE C. SPRAGUE.
President Petitioner.

HUNT, HILL & BETTS,
Proctors for Petitioner, 120 *Broadway,*
Borough of Manhattan, New York City.

23 STATE OF NEW YORK,
County of New York, City of New York, ss:

George C. Sprague, being duly sworn, deposes and says that he is the President of Oneida Navigation Corporation, the petitioner

named in the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true to the best of deponent's knowledge, information and belief.

GEORGE C. SPRAGUE.

Sworn to before me this 11th day of Sept., 1918.

ISABEL W. BONNER,
Notary Public, New York County No. 196.

[Seal of Isabel W. Bonner, Notary Public, New York County.]

Certificate Filed in Register's Office N. Y. County No. 10036, my Commission Expires March 30th, 1920.

24 *Interrogatories Addressed to the Respondent, W. & S. Job & Company, Inc., as to Which Their Answers are Required to be Given Under Oath:*

1. State whether the agreement attached to the petition herein and marked "A" is a true copy of the agreement entered into on August 30, 1916, between W. & S. Job & Co., Inc., of New York City, N. Y., party of the first part, and Anderson T. Herd of the same place, party of the second part, and if it is not a true copy, state wherein it differs.

2. Is the annexed copy of memorandum of agreement dated March 20, 1916, signed by R. L. Bean and W. & S. Job & Company, Inc., W. C. Job, President, and the attached copy of letter to R. L. Bean, dated March 21, 1916, with specifications attached thereto, marked "B 1" and "B 2" a correct copy of the original memorandum of agreement, contract and specifications for the construction of the four masted, double deck schooner, later sold by W. & S. Job & Co., Inc., to Anderson T. Herd, by agreement dated August 30, 1916, and is it a true copy of the contracts and specifications referred to in said agreement; and if not a correct copy of the said contract and specifications entered into between R. L. Bean and W. & S. Job & Co., Inc., and referred to in the agreement of August 30, 1916, between W. & S. Job & Co., Inc., and Anderson T. Herd, please state in what particulars it differs from the original.

3. State whether you supervised the construction of the said schooner referred to in the agreement of August 30, 1916, between W. & S. Job & Co., Inc., and Anderson T. Herd; and if so, state exactly what you did.

HUNT, HILL & BETTS,
Proctors for Claimant.

25 Agreement, made August 30th, 1916, between W. & S. Job & Co., Inc., of New York City, N. Y., party of the first part, and Anderson T. Herd, of the same place, party of the second part.

Whereas, W. & S. Job & Co., Inc., on or about March 25, 1916, contracted with R. L. Bean of Camden, Maine, for the construction

of a vessel which is now in course of construction, and have paid to said Bean $20,000. on account of said contract, and on or about March 24, 1916, contracted with Belinders Company for an engine for said vessel, and have paid $7,386. upon account of said contract, and

Whereas, the party of the second part has seen and examined said contracts and specifications attached thereto, and the said vessel, and desires to purchase said vessel.

Now, Therefore, it is agreed:

1. The party of the first part agrees to sell and the party of the second part agrees to buy said vessel for the price or sum equal to the cost of said vessel under said contracts plus $30,000. profit to the party of the first part, plus five per cent (5%) commission, amounting to $7,607.90, which commission is to be paid to or allowed to the party of the second part at the time of the execution of this agreement.

2. The party of the second part shall pay to the party of the first part the sum of $110,000. at the date hereof upon account of the purchase price.

3. The party of the first part will proceed to carry out its contracts for the construction of said vessel to completion without any delay or default on the part of the party of the first part, and will
26 give to the party of the second part full opportunity to inspect said vessel at any and all reasonable times.

4. Upon completion of said vessel the party of the first part will execute and deliver to the party of the second part a proper bill of sale of said vessel free and clear of all liens and encumbrances in anywise connected with the construction of said vessel, and hereby agrees to receive and the party of the second party hereby agrees to pay the balance of the purchase price to the party of the first part, together with the sum of One thousand ($1,000.) dollars, for construction supervision services out of the first moneys received upon the chartering of said vessel.

5. The party of the second part covenants and agrees to deliver a bill of sale signed by him in blank for said vessel, which the party of the second part agrees to hold as security for the payment of the balance of the purchase price and the sum for supervision services above mentioned, and to return same when the said balance and sum are fully paid and satisfied.

6. The party of the second part further agrees that the party of the first part shall have the option or right to make the first charter for said vessel provided the same is satisfactory to the party of the second part and shall have the option or right to manage her for charter or sail upon the usual commissions, said right to be terminable upon — days' notice after the first charter.

7. In the event of any default by either party hereto upon any of the terms and conditions hereof, the rights and remedies and liabilities of the parties shall be as provided by the statutes or common law in the State of New York.

27 8. It is understood and agreed by the parties hereto that this agreement and all rights thereunder are to be assigned by the party of the second part to Percy R. Pyne, 2nd.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

W. & S. JOB & CO., INC.,
W. C. JOB,
President.

ANDERSON T. HERD.

In the presence of
FRANCIS SPEIR.

Endorsed.

NEW YORK CITY, August 30, 1916.

For value received I hereby assign the within agreement and all my rights thereunder to Percy R. Pyne, 2nd.

(Sgd.) ANDERSON T. HERD. [L. S.]

In the presence of
FRANCIS SPEIR.

28 NEW YORK, March 20, 1916.

Memorandum of Agreement by and between R. L. Bean of Camden, Maine, party of the first part, and W. & S. Job & Company, Inc., of New York, parties of the second part, to build a four masted keel schooner with four-foot waist of the following dimensions:

Keel 190 feet long.
Beam 40 feet.
Depth 19 feet, as per specifications.

Said Schooner is to be built so that she will class A 1 for fifteen (15) years in the Bureau of American and Foreign Shipping.

For said Schooner completed, fitted and ready for sea, according to specifications with the usual Bath outfit, the said R. L. Bean is to receive the sum of Ninety-Five Thousand Dollars ($95,000.00) in payments as follows:

$5,000 when contract is signed.
$5,000 when frame arrives at shipyard.
$10,000 when the square frames are up.
$25,000 when ceiled.
$25,000 when planked.
$25,000 to be paid when vessel is launched and ready for sea, and delivery in accordance with terms of said contract.

In Witness Whereof, the parties hereunto have executed this instrument in duplicate, hereto interchangeably setting their hands and seals the day and year first above written, binding their heirs, executors, administrators and assigns.

(Sgd.) R. L. BEAN.
(Sgd.) W. & S. JOB & CO., INC.,
W. C. JOB,
President.

Witness:
(Signed) DAVID COHEN.

29 *Specification for Four Master Double Deck Schooner for W. & S. Job & Co., Incorporated.*

Dimensions: Keel 190 feet in length; Beam 40 feet; Depth 19 feet in the shoalest place.

Keel: To be oak, sided 13″, moulded 12″ two strings, also a shoe three (3) inches thick the entire length of keel.

Frames: To be of Virginia Oak. Floor timbers moulded 12″ over center of keel. Top timbers to side 9″, 10″ and 11″. Moulded 7″ at the gunwhale.

Stem & Apron: Oak, sided to correspond with keel, Moulded 14″.

Stern Post: Oak sided 13″ at keel and 15″ at plug. Moulded 15″.

Rudder Post: Oak to be 15″ in diam., from lower end of plug to head of post, three sets of composition braces, with 3″ pintle, and post properly banded at head, and after section of rudder post to be rounded to fit post.

Deadwood: Oak and hard pine, moulded to suit post and keel.

Keelsons: Four (4) tiers 13″ x 13″ hard pine fastened with 1¼″ iron.

Assistant Keelsons: Two (2) tiers on each side 12″ x 13″ fastened with 1¼ iron into floor timbers.

Ceiling: On flat of floor to be 3½″ thick out to within one strake of floor head from thereto foot of hanging knees to be 10″ thick, from foot of knees to deck frame 9″ thick. Ceiling to be
30 square fastened with 1⅛ iron except flat of floor which is to be fastened with treenails or spikes to suit Captain. Ceiling between decks to be 7″ thick fastened with ⅞″ iron. It is understood and agreed that this vessel shall have bowports satisfactory to party of second part.

Brows: Vessel to have proper lumber brows.

Beams: To be 10″ x 14″ spaced 4 ft. on centers. Hatch beams 10″ x 14″.

Hatches: To be of suitable size 12″ x 14″.

Stanchions: Under beams 7″ x 14″ and secured by iron straps over beams, and hard pine lock strakes 4″ x 8″ at foot of stanchion.

Hanging Knees: 8″ and 9″ hackmatack in lower hold properly fastened. Between deck knees 7″.

Hooks & Pointers: To be satisfactory to inspector.

Waterways: Two (2) waterway strakes 10″ x 12″ locked over beams and well fastened.

Main Rail: Hard Pine or Oak at second party's option 5″ thick.

Decking: White pine, best quality 3½″ x 5″, fastened with galv'd spikes of proper size and length, plugs to be dipped in white lead.

Poop: To extend just forward of after house or further forward if so requested by party of second part.

Deck: Poop deck to be of white pine 3½″ x 5″ fastened with 5″ x ⅜″ galv'd spikes, plugged. Plugs dipped in white lead. Top of houses 3″ x 4″ white pine.

Chocks: Hard pine chocks around aft 8″ x 10″ with turned stanchions and fly rail 4″ thick of suitable width fastened
31 to chock with 6/8″ galv'd bolts. Bow chocks of oak, suitably fastened.

Forecastle Deck: To extend aft to forward end of forward house with crew space for 8 deck hands.

Outside Planking: Hard Pine, Garboards two 7" x 13". Balance of planking to plankshear 3½" thick to turn of bilge. From there to rail 4" thick.

Bulwarks: To be of hard pine 3" thick fastened with galv'd spikes and plugged.

Waist: To be four (4) feet deep.

Hatches: Main and after hatches of size satisfactory and suitable to Captain. Inside of hatches lined with 3" x ¼" galv'd iron, turned over lower corner. Top of hatch coamings to be covered with galv'd iron ⅜" thick. Each hatch to have two wooden hatch bars 5" x 6" hard pine with galv'd plate on top end and with proper galv'd end fastenings. Also galv'd ironhatch battings Stanchions to be ironed in the hatches, also keelsons under hatches.

Spars: Four Oregon Masts. Foremost 25" balance 24" Oregon bowsprit 24" x 24" in knight heads 30 ft. in length.

Small spars to be spruce or Oregon at option of builders, providing these spars are sound material and the size of sticks are of proper proportions.

Trestle trees, bolsters, fids, and clappers to be oak.

32 Rigging: Each mast shall have four (4) shrouds on each side and two mast head shrouds on formast of galv'd iron wire rope properly served and fitted. Size of standing wire rope shall be as follows:

One of the foremast 3¾" main, mizzen and spanker 3½". All set up with turnbuckles of proper sizes. Galv'd iron stays, etc. and running rigging shall be of suitable dimensions and weight for a vessel as described above. Vessel to have double topping lifts and double spring stays, oak rattlings, and foretopmast to have double back stays.

Block: A suit of 14" blocks and other blocks of suitable sizes as manufactured by Knowlton Bros.

Manila Rope: 100 fms. 6" hawser, 100 fms. 4½" lines, running rigging in sizes and quality in proportion to size of this vessel.

Chains: To have 200 fms. 1⅞" diam. stud link tested cable chain.

Anchors: Two Baldt stockless anchors to weigh, one 4000 lbs. and one 3800 lbs. One kedge anchor 450 lbs., and two patent riders.

Sails: A good suit of machine made sails including sail covers tarpaulins, mast coats, boat covers and awning aft. Made from the best duck. Lower sails to — No. 0 duck. All other sails to be of proper size and weight.

Steerer: A Robinson steerer of suitable size. Woodwheel.

Windlass: Knowlton Brothers or Hyde Windlass and capstan of proper sizes.

33 Engine: Hoisting engine with wrecking pump fittings, etc., suitable for such a vessel.

Water Tanks: Two iron tanks located on the keelson of about 1400 gallons capacity with manhole.

Boats: One boat 24 ft. long, fitted with 5 H. P. gasoline motor engine; oars, etc. One boat 15 ft. long with oars.

Davits: To have davits for stern boat of proper size. Iron work

connecting them to deck and rail to be galv'd. Also light davits for small boats alongside.

Salt: Vessel to be thoroughly oiled during construction.

Caulking: to be done with best oakum and caulked in the most thorough manner.

Painting: To have two coats of best copper paint on bottom, also two coats of colors outside to suit owners.

Insurance: The builders are to furnish and pay for all policies for insurance against fire, risk of launching, etc., as each payment is made until vessel is finally delivered to owners. The premium for same to be paid by the builders. Said policies to be made payable in case of loss to W. & S. Job & Company Incorporated.

In General: The intent of this contract is to build, construct, fit and furnish vessel ready for sea with exception of stores, and medicines, but including Medicine chest, with rate A1 for fifteen years (15) in the Record of American Bureau of Shipping, class to be paid for by the builders.

Stern Fittings for Engine: It is understood if parties of second part decide on fitting stern to accommodate internal com-
34 bustion engines, which are to be furnished by said parties of the second part at their expense, it is agreed that the same shall be built by the parties of the first part under the supervision and instructions of said parties of the second part, and the additional cost of doing this work to be at expense of parties of second part. The cost of labor and material to be at actual cost.

Anything not mentioned in this contract as regards material or sizes thereof, to be what is right and suitable for this vessel, so that she will receive as good a class as any vessel built of the same material.

Parties of the second part to have privilege of having representative at yard while vessel is being constructed for the purpose of seeing that vessel is being built in accordance with above specifications.

Date of Delivery: It is understood that vessel is to be delivered not later than October 15th, 1916, but any time lost through Act of God, Political Impediments, storms, strikes, lockouts, delivery of material, fire and accidents, which is beyond said party of first part's control, to be mutually excepted.

It is also understood and agreed that in event of said schooner's frame not arriving at Camden, Me., before June 1, 1916, and said party of the first part can see that the schooner will be delayed in construction, that he will notify the party of second part and give said party of second part opportunity to cancel contract and all money deposited shall be refunded.

It is the intention of said party of first part to make delivery of said ship herein mentioned during the month of September 1916, and all efforts will be made to do so.

35 Capacity of Ship: It is estimated that capacity of said schooner on measurements of 190 feet keel, 40 feet beam, 19 feet depth of hold, to be Eighteen Hundred (1800) gross tons, exclusive of space for engines, which parties of second part propose installing in said schooner.

It is agreed that said party of second part shall have right to transfer this contract to a responsible party or parties.

(Sgd.) W. & S. JOB & CO., INC.,
(Sgd.) R. L. BEAN,
W. C. JOB,
President.

Witness:
(Sgd.) DAVID COHEN.

36 March 21, 1916.

Mr R. L. Bean, City.

DEAR SIR: Confirming our conversation with you regarding the contract just signed for building of a new vessel, we now beg to state that we want you to make the length of this vessel on the keel 205 feet in place of 190 feet and it is understood that the extra cost of this alteration as well as other alterations in the specification, as a consequence of this change will be the sum of $6,000.00. We understand that you will write us a confirmation of this variation in the contract as soon as possible after your return to Camden and after you have satisfied yourself as to the securing the extra number of frames, etc., requisite for the alteration.

Yours very truly,

—— ——.

R. B. J./B.

[Endorsed:] U. S. District Court, Southern District of N.
37 Y. James W. Smith and George U. Kirkpatrick, doing business, etc., Libellants, against The Sailing Vessel "Percy R. Pyne, 2nd", her tackle, apparel, etc., (Oneida Navigation Corporation) Claimant. Petition to Vouch in W. & S. Job & Co., Inc. (Copy). Hunt, Hill & Betts, Proctors for Claimants, Equitable Building, 120 Broadway, New York City. Copy received Sept. 19, '18. Carter & Carter Procs. for Job & Co.

38 United States District Court, Southern District of New York.

JAMES W. SMITH and GEORGE U. KIRKPATRICK, Doing Business under the Firm Name of SMITH, KIRKPATRICK & Co., Libellants,

vs.

THE SAILING VESSEL "PERCY R. PYNE 2ND," Her Tackle, etc.

Exceptions to Petition.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

W. & S. Job & Company, Inc., brought into the above-entitled action as a party defendant by Petition of the Oneida Navigation Corporation, excepts to the whole of the said Petition of the said Oneida Navigation Corporation against W. & S. Job & Company, Inc. herein, on the following grounds:

First. Because the allegations thereof do not disclose any admiralty or maritime jurisdiction.

Second. Because the allegations thereof show that the damages claimed to the cargo on the said Sailing Vessel "Percy R. Pyne 2nd" arose from a breach of contract in the sale of the said vessel and for defective construction and alteration of the said sailing
39 vessel, which is not a cause of action within the admiralty and maritime jurisdiction, as it does not concern transportation by sea, and does not relate to navigation or to maritime employment.

Third. Because the allegations thereof do not disclose any cause of action in admiralty against W. & S. Job & Company, Inc., the party defendant, for the reason that W. & S. Job & Company, Inc. did not enter into any contract with Anderson T. Herd, the purchaser of the sailing vessel from W. & S. Job & Company, Inc., or with Percy R. Pyne 2nd, the second purchaser, or with the Oneida Navigation Corporation, the third purchaser and the petitioner herein, or with Arkell & Douglas, Inc., the charterer of said vessel, or with the shippers or consignees of the said vessel's cargo, guaranteeing that at the time of the sale and launching of the said vessel and before and at the time of the chartering of the said vessel that the said vessel was in a seaworthy condition.

Fourth. Because the allegations thereof do not disclose any cause of action in admiralty against W. & S. Job & Company, Inc., the party defendant, for the reason that W. & S. Job & Company, Inc. did not enter into any contract with Anderson T. Herd, the purchaser of the sailing vessel from W. & S. Job & Company, Inc., or with Percy R. Pyne 2nd, the second purchaser, or with the Oneida Navigation Corporation, the third purchaser and the petitioner herein, or with Arkell & Douglas, Inc., the charterer of said vessel, or with the shippers or consignees of the said vessel's cargo, for the safe transportation of the shipment of wool from South Africa to Boston, Mass.

40 Wherefore, the said W. & S. Job & Company, Inc., the party defendant, prays that the Petition against it herein be dismissed with costs, or that this Honorable Court will decree whether it shall be compelled to make any further answer to the said Petition; and for such other and further relief in the premises as may be just. Dated, September 28th, 1918.

CARTER & CARTER,
Proctors for Party Defendant,
W. & S. Job & Company, Inc.

41 [Endorsed:] 64-340. United States District Court, Southern District of New York. James W. Smith and Ano., etc., Libellants, vs. The Sailing Vessel "Percy R. Pyne 2nd", etc. (Copy) Exceptions to Petition. Carter & Carter, Proctors for Party Defendant, 15 Whitehall Street, New York City. To Hunt, Hill & Betts, Esqr., 120 Broadway, N. Y. City.

42 United States District Court, Southern District of New York.

JAMES W. SMITH and GEORGE U. KIRKPATRICK, Doing Business Under the Firm Name of SMITH, KIRKPATRICK & Co., Libellants,

against

THE SAILING VESSEL "PERCY R. PYNE 2ND", Her Tackle, Apparel, etc.; Oneida Navigation Corporation, Claimant, and W. & S. Job & Company, Inc., Impleaded, Respondent.

The claimant, Oneida Navigation Corporation, hereby amends its petition filed herein against W. & S. Job & Company, Inc., verified September 11, 1918, pursuant to the permission of this Court, as follows:

Claimant-Petitioner amends Article "fifth" of said petition to read as follows:

"Fifth. That the said schooner, which was the subject matter of said agreement between W. & S. Job & Company, Inc., and Anderson T. Herd, duly assigned as aforesaid, was completed, including the installation of her masts, spars and sails, and was launched from her ways and put into the water as a completed schooner, and thereafter, and while said schooner was in the water and was a vessel and a completed schooner, subject to the admiralty jurisdiction of the United States, the engine mentioned in said agreement and its appurtenances and appliances were installed in said schooner, and certain structural changes made in the frame of said schooner to accommodate said engine under the supervision of said W. & S. Job & Company, Inc., pursuant to the agreement above referred to. That thereafter the schooner so constructed under said agreement, assigned as aforesaid, was delivered by said W. & S. Job & Company, Inc., to the petitioner on or about February 13, 1917, and was represented by said W. & S. Job & Company, Inc., to have been

43 constructed and supervised by it according to the terms of said agreement, and the contracts and specifications referred to therein; and petitioner, relying upon said representations and supervision of W. & S. Job & Company, Inc., took delivery of said schooner and became the owner thereof, and thereafter operated her under the name of Percy R. Pyne, 2nd."

Claimant-Petitioner amends Article "Ninth" of said petition to read as follows:

"Ninth. That your petitioner denies any liability on the part of itself or said schooner for the damages alleged in said libel, and alleges that if any liability attaches to said schooner for said damages, said W. & S. Job & Company, Inc. are under an obligation to indemnify the claimant therefor under the said contract between W. & S. Job & Company, Inc., and Anderson T. Herd, by reason of the non-compliance of W. & S. Job & Company, Inc., with said contract and specifications, and particularly in the failure to properly construct and fasten said schooner, to have the proper materials used therein, and in the cutting away of her timbers and frame for the installation of an auxiliary engine, and in failing to make said vessel tight, so that leaks would be prevented, and to properly and care-

fully supervise the construction of said vessel, both before and after she was launched, and the installation of said engine, in order to see that said vessel was made tight and staunch and was not weakened thereby, and that if any of said damage was caused by unseaworthiness, as alleged in the libel, it was caused by such default of W. & S. Job & Company, Inc."

All and singular the premises of this amendment are true and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

HUNT, HILL & BETTS,
Proctors for Oneida Navigation Corporation,
Claimant and Petitioner.

120 Broadway, Borough of Manhattan, New York City.

44 CITY, COUNTY AND STATE OF NEW YORK,
Southern District of New York, ss:

Frank G. Cornish, being duly sworn, deposes and says that he is the President of the Oneida Navigation Corporation; that he has read the foregoing amendment to petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

Sworn to before me this 30th day of Oct., 1918.

FRANK G. CORNISH.

[SEAL.] ISABEL W. BONNER
Notary Public, New York County No. 196.

Certificate filed in Register's Office, N. Y. County, No. 10036. My commission expires March 30th, 1920.

45 United States District Court, Southern District of New York.

64-340.

JAMES W. SMITH and Another, Libellants,

against

THE SAILING VESSEL "PERCY R. PYNE 2ND, etc., ONEIDA NAVIGATION Corporation, Claimant; W. & S. Job & Company, Inc., Impleaded, Respondent.

It is hereby stipulated and agreed that the exceptions heretofore filed herein by W. & S. Job & Company, Inc., to the petition of Oneida Navigation Corporation and the amended exceptions filed to the amended petition shall be deemed to be exceptions to the petition of said Oneida Navigation Corporation as amended by amendment filed herein October 30th, 1918.

Dated, November 1st, 1918.

HUNT, HILL & BETTS,
Proctors for Petitioner.
CARTER & CARTER,
Proctors for W. & S. Job & Company, Inc.

46 United States District Court, Southern District of New York.

JAMES W. SMITH and GEORGE U. KIRKPATRICK, etc., Libellants,

vs.

THE SAILING VESSEL "PERCY R. PYNE 2ND", etc.

Exceptions to Amendment to Petition.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

W. & S. Job & Company, Inc., brought into the above-entitled action as a party defendant by Petition of the Oneida Navigation Corporation, excepts to the Amended "Fifth" Article and Amended "Ninth" Article of the original Petition of said Oneida Navigation Corporation against W. & S. Job & Company herein, on the following grounds:

First. Because the allegation of the Amended "Fifth" Article of said Petition, alleging:

"was completed, including the installation of her masts, spars and sails, and was launched from her ways and put into the water as a completed schooner, and, thereafter, and while said schooner was in the water and was a vessel and a completed schooner, subject to the admiralty jurisdiction of the United States,"

does not disclose any admiralty or maritime jurisdiction.

47 Second. Because the allegations of the Amended "Ninth" Article of said Petition, commencing with the words "and alleges", on the third line thereof, and ending with the words "W. & S. Job & Company, Inc.", on the last line thereof, do not disclose any admiralty or maritime jurisdiction.

Third. Because the allegations of the Amended "Fifth" Article and the Amended "Ninth" Article of said Petition do not set forth any valid or legal right or claim subject to the admiralty jurisdiction, or any valid or legal right to bring in W. & S. Job & Company, Inc. as a party defendant in the libel suits in admiralty that have been brought against the said Sailing Vessel "Percy R. Pyne 2nd" to recover for damage to cargo.

Wherefore, the said W. & S. Job & Company, Inc., the party defendant, prays that the Petition against it herein, and the Amended "Fifth" and Amended "Ninth" Articles of said Petition, be dismissed with costs, or that this Honorable Court will decree whether it shall be compelled to make any further answer to the said Petition and said Amended "Fifth" and Amended "Ninth" Articles; and for such other and further relief in the premises as may be just.

Dated, November 1st, 1918.

CARTER & CARTER,
Proctors for Party Defendant,
W. & S. Job & Company, Inc.

48 [Endorsed:] 64-340. United States District Court, Southern District of New York. James W. Smith and Ano.,

etc., Libellants, vs. The Sailing Vessel "Percy R. Pyne 2nd", etc. (Copy Exceptions to amendment to petition. Carter & Carter, Proctors for W. & S. Job & Company, Inc., 15 Whitehall Street, New York City. To Hunt, Hill & Betts, Esqr., 120 Broadway, N. Y. City.

49 At a Stated Term of the United States District Court for the Southern District of New York, held at the Court Rooms thereof, in the Post Office Building, Borough of Manhattan, City of New York, on the 4th day of November, 1918.

Present: Honorable Learned Hand, District Judge.

JAMES W. SMITH and GEORGE U. KIRKPATRICK, Doing Business under the Firm Name of SMITH, KIRKPATRICK & COMPANY, Libellants,

against

THE SAILING VESSEL "PERCY R. PYNE, 2ND," Her Tackle, Apparel, etc.; Oneida Navigation Corporation, Claimant, and W. & S. Job & Company, Inc., Impleaded, Respondent.

The respondent, W. & S. Job & Company, Inc., having filed exceptions to the petition of the claimant bringing in said respondent as a third party defendant under Rule 15, on the ground that the issues between claimant and respondent were not within admiralty jurisdiction, and said exceptions having been sustained, after argument, by order of this court entered on the 25th day of October, 1918, with leave to claimant to plead over, and the claimant having amended its said petition herein by amendment filed on Octo-
50 ber 30, 1918 and the parties having stipulated that the exceptions heretofore filed herein to the petition and the amended exceptions filed to the amended petition shall be deemed to be exceptions to the petition as amended, and said exceptions having come on before this court on the 4th day of November, 1918, and after hearing Carter & Carter in support of said exceptions, and Hunt, Hill & Betts in opposition thereto, and the court being of the opinion, for the reasons stated in the opinion filed herein on the 18th day of October, 1918, that it is without jurisdiction in the premises and that the exceptions should be sustained, it is

Now, upon motion of Carter & Carter, proctors for respondent,

Ordered, Adjudged and Decreed that said exceptions of W. & S. Job & Company, Inc. to said petition and to the amended petition of said Oneida Navigation Corporation, be and the same hereby are in all respects sustained, and that said petition and amended petition be and the same hereby are dismissed, on the ground that the petition and amended petition does not set forth matters within the admiralty jurisdiction of this court, and that the respondent recover of the claimant the sum of $15.00 costs as taxed.

LEARNED HAND,
U. S. D. J.

Notice of settlement of the foregoing decree is waived.

HUNT, HILL & BETTS,
Proctors for Petitioner.

51 SIR: Take notice that an original Decree of which the within is a copy, was duly filed in the office of the Clerk of this Court on the 6th day of November, 1918.

Yours, &c.,

CARTER & CARTER,
Proctors for W. & S. Job & Company, Inc.

[Endorsed:] 64-340. United States District Court, Southern District of New York. James W. Smith and Ano., Libellants, vs. The Sailing Vessel "Percy R. Pyne, II", etc.; Oneida Navigation Corporation, Claimant; W. — S. Job & Company, Inc., Impleaded, Respondent. Copy. Decree sustaining exceptions to amended petition, and dismissing petition and amended petition. Carter & Carter, Proctors for W. & S. Job & Company, Inc., 15 Whitehall Street, New York City. To Hunt, Hill & Betts, Esqrs., 120 Broadway, N. Y. City. Nov. 7, 1918.

52 United States District Court, Southern District of New York.

THE PERCY R. PYNE, 2ND.

Exceptions to a Petition of the Claimant, Oneida Navigation Company, Seeking to Bring in a Party under the Fifty-ninth Rule.

The case was this: The libellant sued the Schooner Percy R. Pyne, 2nd, in rem under a bill of lading, alleging that their property while being carried by the schooner was injured through the schooner's unseaworthy condition, resulting from cutting away some of her timbers to install an auxiliary engine. The claimant appeared as owner and answered the libel. Thereafter it filed this petition to bring in Job & Company under the following allegations: Job & Co. had made a contract with one Bean for the construction of a schooner and had paid down a certain part of the purchase price. They had also a contract with the Belinders Company to buy an auxiliary engine. While the vessel was still uncompleted, Job & Co. agreed to sell her to one Herd, through whom the claimant makes title. The agreement provided that Job & Co. should continue to supervise the performance of Bean's contract and also the installation of the auxiliary engine.

The exceptions go only to the jurisdiction of this court.

Peter Carter for exceptant.

George Whitefield Betts, Jr., and George C. Sprague for the petitioner.

53 LEARNED HAND *D. J.*: The first question is whether the contract between Job & Co. and the petitioner is maritime. The petitioner does not of course allege that a contract to build a

ship is maritime; they say rather that this was a contract to supervise the completion of the ship including the installation of her engine, after she was launched and that as such it is an undertaking quite separate from the contract to build the ship and is maritime in its nature. Now in the first place there is no hint of all this in the pleadings, which do not show when the contract was made. For all that appears the ship was still on the ways and the contract of supervision to be performed principally on land. But there is another and a complete answer in any case, because the contract was not merely to supervise the building of a ship, even if it was then afloat. It was a contract to sell the interest which Job & Co. had in the vessel and in the contracts with Bean and the Belinders Company. The provision for supervision was a mere incident to this for which Job & Co. were to receive the sum of one thousand dollars. The right of action may have arisen from a failure to supervise the completion of the vessel according to the plans, or from faults in the plans, which of the two does not appear. Obviously it would make a difference, if the supervision feature is relied upon, but even if the failure were alleged to be one of supervision, in no event may the case be treated as though the contract contained no provisions but those of supervision. In no aspect is the liability "wholly maritime", or even substantially maritime.

Thus the question presented is whether a party appearing as a claimant in the admiralty may implead a third party on a cause of action not itself maritime in its nature. This involves the jurisdiction of this court over the subject-matter and indeed involves the Constitution which created it. We make little advance towards a solution either by presupposing on the one hand that its jurisdiction is to be governed by its limits as understood in 1789, or on the other that the Constitution puts no limit which a more con-
54 venient despatch of business may not disregard under the plea that as admiralty jurisdiction has suffered many unreasonable checks in its proper development, all limits must be unreasonable. That the jurisdiction has extended in one hundred and thirty years is too patent for even the most consistent Platonist to deny. Yet the court remains what it originally was, a court for matters marine, and the question here is only what are the necessary incidents to maritime controversies. I am aware of the perils attendant upon such question-begging words as "necessary incidents"; I use them consciously for brevity. To illustrate a difference which might in my judgment have been held to be controlling, it would have been proper, at least it would seem so to me, to hold that cross claims of non-maritime character should be justiciable in admiralty, and the settled rule to the contrary certainly suffered an invasion in Wilhelms etc. Co. v. Canadian-Venezuela Ore Co., 294 Fed. R. 881. The libellant in such cases asks the court to give him a decree to which he is not entitled except as justice requires it, and justice is properly measured by the sum total of their relations; certainly that is the modern notion. In such cases to decide what the libellant should in justice recover one cannot avoid considering offsets. I cannot see why this might not be a necessary incident to the original maritime dispute. The libellant surely having selected

his tribunal cannot justly complain that he loses his jury if the respondent or claimant is content to press the cross-claim where he is.

But no such paramount claims of justice require the impleading of a third party, certainly in a case like this. It is in no sense necessary to a just settlement of the controversies between the libellant and the claimant, which arises in contract between themselves. In this aspect the claimant here is in no stronger a position than a surety sued at law, whom equity has never thought entitled
55 to protection by requiring the impleading of the principal.

On the one hand I can see no just reason why the libellant should be compelled to submit to the delays attendant upon the introduction of a quite separate set of issues. On the other the claimant, if he needs protection against the third party of the decree here to be entered, may obtain it by vouching in the exceptant by a notice, after which the decree will fix the claimant's loss as against the exceptant in any action at law he may have to bring.

It is of course true that when all the liabilities are maritime we do combine the litigations into one. That has certainly much convenience, though, when the libellant's claim is uncontested, it is even then, often at the expense to him of much delay. Yet in such cases the precedural rights of all the parties remain the same after consolidation as they were before, while in cases such as these the party impleaded loses his jury. That is surely no negligible matter. So it seems to me that the new controversy is not a "necessary incident" of the original maritime controversy, that is, that upon a balance of all considerations there is no clear preponderance of justice or even of convenience for it.

On authority it must be confessed that the question is not certain. In The City of Lincoln, 25 Fed. R. 835, Judge Brown in a similar case made the right to bring in the new party turn upon whether the liability, there a tort, was maritime. Thus he says on page 836: "If such a tort is a marine tort the court has jurisdiction; otherwise not." His opinion is therefore clear on the point here in issue. On the other hand Judge Hough in Evans vs. N. Y. & P. S. S. Co., 163 Fed. R. 405, ruled the opposite, as also in an unreported case, Hewlitt vs. N. Y. & Cuba Mail, April 7, 1916. Until these
56 cases I think the Fifty-ninth Rule had been limited, at least if the point was raised, to causes of admiralty cognizance; that is, it had been treated as a convenience of procedure, consolidating all controversies over which the court had jurisdiction into one litigation but not attempting to extend the substantive jurisdiction of the court. In his opinion in Evans vs. N. Y. & P. S. S. Co., supra, Judge Hough says that in Salisbury vs. 70,000 Feet of Lumber, 68 Fed. R. 916, he argued the point in favor of the third party, and was overruled, but the opinion gives no indication that Judge Brown had changed his opinion in The City of Lincoln, supra, and it is possible that he thought the contract between Burroughs and Herbst to be of maritime cognizance. Judge Mayer in Lorna Fruit Co. v. Warren & Co., May 31, 1916, and November 24, 1916, both unreported, followed Judge Hough. I do not regard The Cerea, 149 Fed. R. 924, as in point.

Judge Manton's ruling in Philadelphia Shipping Co. vs. Alban

George Henry Baron Aldenham, January 31, 1918, unreported, went upon the theory that the liability rested on a maritime contract, as he says.

The Ada, 250 Fed. R. 194, did not present the question and I take Judge Roger's guarded language to be meant expressly to reserve opinion upon Evans vs. N. Y. & P. S. S. Co., supra. Judge Ward and Judge Hough differed upon the point, so that the case cannot be said even obiter to make an authoritative declaration. I have found nothing else upon it in the books and, as it appears to me still open on authority, I am free to accept that side which seems to accord with principle.

Exceptions sustained, petition dismissed with leave, however, to plead over in ten days.

L. H., *D. J.*

October 18, 1918.

57 United States District Court, Southern District of New York.

64-340.

JAMES W. SMITH and GEORGE U. KIRKPATRICK, Doing Business under the Firm Name of SMITH, KIRKPATRICK & COMPANY, Libellants,

against

THE SAILING VESSEL "PERCY R. PYNE, II," Her Tackle, Apparel, etc.; Oneida Navigation Corporation, Claimant-Appellant, and W. & S. Job & Company, Inc., Impleaded, Respondent-Appellee.

Notice of Appeal.

Sirs: Please to take notice that the claimant above named hereby appeals to the Supreme Court of the United States from the final decree of this court, dated November 4, 1918, and entered on the 6th day of November, 1918, in the office of the Clerk of this Court, and from each and every part of said final decree.

Yours, etc.

HUNT, HILL & BETTS,
Proctors for Claimant-Appellant.

No. 120 Broadway, New York City, N. Y.
Dated, New York, Nov. 13, 1918.

To Messrs. Carter & Carter, Proctors for Respondent-Appellee; Messrs. Barry, Wainwright, Thacher & Symmers, Proctors for Libellants; Alexander Gilchrist, Jr., Esq., Clerk of the U. S. District Court for the Southern District of New York.

58 [Endorsed:] 64-340. United States District Court, Southern District of New York. James W. Smith and Ano., etc., Libellants, against The Sailing Vessel "Percy R. Pyne, II", etc., Oneida Navigation Corporation, Claimant-Appellant, and W. & S. Job & Company, Inc., Impleaded, Respondent-Appellee. Notice of

appeal. (Copy.) Hunt, Hill & Betts, Proctors for Claimant-Appellant, Equitable Building, 120 Broadway, New York City. Copy received Nov. 21, 1918, Carter & Carter. Copy received 11-21-18, Barry, W. T. & S., Proctors for Libellant.

59 United States District Court, Southern District of New York.

64-340.

JAMES W. SMITH and GEORGE U. KIRKPATRICK, Doing Business under the Firm Name of SMITH, KIRKPATRICK & COMPANY, Libellants,

against

THE SAILING VESSEL "PERCY R. PYNE, II," Her Tackle, Apparel, etc.; Oneida Navigation Corporation, Claimant-Appellant, and W. & S. Job & Company, Inc., Impleaded, Respondent-Appellee.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To W. & S. Job & Company, Inc., Respondent Above Named, and to Messrs. Carter & Carter, Proctors for Said Respondent:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the 20th day of Dec. 1918 pursuant to an appeal filed in the Office of the Clerk of the District Court of the United States for the Southern District of New York, wherein Oneida Navigation Corporation is appellant and W. & S. Job & Company, Inc., the respondent above named is appellee, to show cause, if any there be, why the decree so appealed from should not be corrected and reversed, and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Edward D. White, Chief Justice of the United States, this 22d day of November, in the year of our Lord,
60 One thousand nine hundred and Eighteen, and of the Independence of the United States the 143rd.

LEARNED HAND,
United States District Judge.

61 [Endorsed:] 64-340. U. S. District Court, Southern District of N. Y. James W. Smith and Ano., etc., Libellants, against The Sailing Vessel "Percy R. Pyne, II", etc., Oneida Navigation Corporation, Claimant-Appellant, and W. & S. Job & Company, Inc., Impleaded, Respondent-Appellee. (Copy.) Citation on appeal. Hunt, Hill & Betts, Proctors for Claimant-Appellant, Equitable Building, 120 Broadway, New York City. Copy received Nov. 22, 1918, Carter & Carter.

62 United States District Court, Southern District of New York.

64-340.

JAMES W. SMITH and GEORGE U. KIRKPATRICK, Doing Business under the Firm Name of SMITH, KIRKPATRICK & COMPANY, Libellants,

against

THE SAILING VESSEL "PERCY R. PYNE, II," Her Tackle, Apparel, etc.; Oneida Navigation Corporation, Claimant-Appellant, and W. & S. Job & Company, Inc., Impleaded, Respondent-Appellee.

Petition for Allowance of Appeal, and Order of Allowance.

The above named claimant, Oneida Navigation Corporation, conceiving itself aggrieved by the final decree entered herein on the 6th day of November, 1918, whereby the exceptions to the petition and amended petition of the claimant against W. & S. Job & Company, Inc., were sustained, and whereby said petition and amended petition were dismissed, and having filed with the Clerk of the said District Court an Assignment of Errors, does hereby appeal from said final decree to the Supreme Court of the United States for the reasons specified in said Assignment of Errors, and it prays that this, its appeal, may be allowed, and that the question of the jurisdiction of the above entitled District Court to entertain the said petition and amended petition and to award the relief therein sought, be certified to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which said final decree was made, duly authenticated, may be
63 sent to the Supreme Court of the United States.

Dated, New York, November 14, 1918.

HUNT, HILL & BETTS,
Proctors for Claimant-Appellant,
120 Broadway, New York City.

New York, November 22d, 1918.

And now, to-wit: On November 22d, 1918, it is
Ordered that the appeal be allowed as prayed for.

LEARNED HAND,
U. S. D. J.

64 SIR: Take notice that the within is a copy of a Petition and Order this day duly filed herein in the office of the Clerk of this Court. Dated, New York, Nov. 22, 1918. Yours, etc., Hunt, Hill & Betts, Proctors for —, 120 Broadway, Borough of Manhattan, New York City. To Carter & Carter, Proctors for W. & S. Job & Co., Inc., Barry, Wainright, Thacher & Symmers, Proctors for Libellant.

[Endorsed:] 64-340. U. S. District Court, Southern District of N. Y. James W. Smith and Ano., etc., Libellants, against The Sail-

ing Vessel "Percy R. Pyne, II", etc., Oneida Navigation Corporation, Claimant-Appellant, and W. & S. Job & Company, Inc., Impleaded, Respondent-Appellee. Petition for allowance of appeal and order of allowance and notice of filing. Copy. Hunt, Hill & Betts, Proctors for Claimant-Appellant. Equitable Building. 120 Broadway, New York City. Received Nov. 22, 1918, B. W. T. & S. Copy received Nov. 22, 1918, Carter & Carter.

65 United States District Court, Southern District of New York.

64-340

JAMES W. SMITH and GEORGE U. KIRKPATRICK, Doing Business under the Firm Name of SMITH, KIRKPATRICK & COMPANY, Libellants,

against

THE SAILING VESSEL "PERCY R. PYNE, II", Her Tackle, Apparel, etc.; Oneida Navigation Corporation, Claimant-Appellant, and W. & S. Job & Company, Inc., Impleaded, Respondent-Appellee.

Assignment of Errors.

Now comes Oneida Navigation Corporation, the claimant-appellant, by Hunt, Hill & Betts, its proctors, and having appealed from the final decree of the District Court of the United States for the Southern District of New York, entered in said court on the 6th day of November, 1918, whereby the exceptions of W. & S. Job & Company, Inc., respondent-appellee, to the petition and amended petition of the said claimant-appellant, were sustained, and the said petition and amended petition were dismissed, to the Supreme Court of the United States, in the above entitled cause of contract and cargo damage, civil and maritime, assigns the following as the errors on which it intends to rely on said appeal:

The District Court of the United States, for the Southern District of New York, erred:

First. In sustaining the exceptions, and each of them, to the said petition and amended petition.

66 Second. In holding that the allegations of the said petition and amended petition did not disclose any cause of action of admiralty and maritime jurisdiction.

Third. In adjudging and decreeing a dismissal of the said petition and amended petition.

Fourth. In holding that the said Court had no jurisdiction to entertain the said petition and amended petition, and to award the petitioner the relief therein prayed for.

Fifth. In holding that this Court, sitting as a Court of admiralty, had no jurisdiction to bring in the respondent W. & S. Job & Company, Inc., as a third party respondent, because the contract with said respondent set forth in the petition and amended petition was not essentially maritime.

Sixth. In not holding that after the completion and launching of the Schooner "Percy R. Pyne II", the installation of the engine

and structural changes in the frame of the Schooner therefor and the supervision thereof by said respondent, as alleged in the petition and amended petition, were essentially maritime in their nature and gave this Court, sitting in admiralty, jurisdiction to entertain the petition and amended petition.

Seventh. In holding that on the facts set forth in the petition and amended petition there could be no recovery over against said respondent W. & S. Job & Company, Inc. in this action and said respondent could not be brought in as a third party respondent, notwithstanding Admiralty Rules 59 of the Supreme Court and 15 of this Court.

67 Eighth. In entering judgment against the claimant in favor of said respondent for the sum of $15.00.

Dated, New York, November 13th, 1918.

HUNT, HILL & BETTS,
Proctors for Claimant-Appellant.

68 SIR: Take notice that the within is a copy of Assignment of Error this day duly filed herein in the office of the Clerk of this Court.

Dated, New York, Nov. 22, 1918.

Yours, etc.,

HUNT, HILL & BETTS,
Proctors for —.

120 Broadway, Borough of Manhattan, New York City.

To Carter & Carter, Proctors for W. & S. Job & Co., Inc.

[Endorsed:] 64-430. U. S. District Court, Southern District of N. Y. James W. Smith and ano., etc., Libellants, against The Sailing Vessel "Percy R. Pyne, II", etc., Oneida Navigation Corporation, Claimant-Appellant, and W. & S. Job & Company, Inc., Impleaded, Respondent-Appellee. Assignment of Errors and Notice of Filing. (Copy.) Hunt, Hill & Betts, Proctors for Claimant-Appellant, Equitable Building, 120 Broadway, New York City. H., H. & B. Copy received Nov. 22, 1918. Carter & Carter.

69 United States District Court, Southern District of New York.

64-340.

JAMES W. SMITH and GEORGE U. KIRKPATRICK, Doing Business Under the Firm Name of SMITH, KIRKPATRICK & COMPANY, Libellants,

against

THE SAILING VESSEL "PERCY R. PYNE, II", Her Tackle, Apparel, etc.; ONEIDA NAVIGATION CORPORATION, Claimant-Appellant, and W. & S. JOB & COMPANY, INC., Impleaded, Respondent-Appellee.

Certificate as to Question of Jurisdiction.

I, Learned Hand, Judge of the United States District Court for the Southern District of New York, do hereby certify that the petition and amended petition of the Oneida Navigation Corporation against W. & S. Job & Company, Inc., were dismissed by me for the reason that the said W. & S. Job & Company, Inc., appeared herein and filed exceptions to the said petition and amended petition on the ground that said petition and amended petition did not set forth or disclose any cause of action or matter of admiralty or maritime jurisdiction, and that the said exceptions came on regularly to be heard before me, and that the said W. & S. Job & Company, Inc., did urge that the United States District Court, sitting as a Court of Admiralty, had no jurisdiction to proceed to determine the matters alleged in the said petition and amended petition, or to bring in respondent as a third party respondent, and had no juris-
70 diction over the cause of action or matters set forth in the allegations of said petition and amended petition; and

I do certify that the petition and amended petition herein were dismissed by me and final decree given for the said W. & S. Job & Company, Inc., solely because I deemed that the United States District Court, sitting as a Court of Admiralty, had no jurisdiction to entertain or enforce the cause of action or matters set up in the said petition and amended petition, or to bring in said respondent as a third party respondent.

Copies of the libel, answer, petition and amendments thereto, exceptions, stipulation as to exceptions, opinion of the District Judge and final decree and Rule 15 of the Admiralty rules of this Court are hereto attached and made a part of this certificate.

This certificate is made in conformity with Section 238 of the Act entitled: "An act to modify, revise and amend the laws relating to the judiciary", approved March 3, 1911, chapter 231, as amended.

Dated, New York, November 22d, 1918.

LEARNED HAND,
U. S. D. J.

71 *Admiralty Rule 15 of the District Court of the United States, for the Southern District of New York.*

"15. Third party practice:

"If a defendant shall, by petition on oath, filed before answer, or within such further time as the Court may allow, allege fault in any other party, in respect of the matters complained of in the libel, or shall allege that he is entitled to contribution or indemnity from any other party in respect of such matters, and shall pray that such other party be brought into the suit as a party defendant in analogy with the provisions of Admiralty Rule 59 of the Supreme Court, process on such petition may be issued and the cause shall proceed otherwise as in cases under the 59th Rule."

72 SIR: Take notice that the within is a copy of a Certificate this day duly filed herein in the office of the Clerk of this Court.

Dated, New York, Nov. 22, 1918.

Yours, etc.,

HUNT, HILL & BETTS,
Proctors for —.

120 Broadway, Borough of Manhattan, New York City.

To Carter & Carter, Proctors for W. & S. Job & Co., Inc.

[Endorsed:] 64-340. U. S. District Court, Southern District of New York. James W. Smith and ano., etc., Libellants, against The Sailing Vessel "Percy R. Pyne, II", etc., Oneida Navigation Corporation, Claimant-Appellant; and W. & S. Job & Company, Inc., Impleaded, Respondent-Appellee. (Copy.) Certificate as to Question of Jurisdiction and Notice of Filing. Hunt, Hill & Betts, Proctors for Claimant-Appellant, Equitable Building, 120 Broadway, New York City. H., H. & B. Copy received Nov. 22, 1918. Carter & Carter.

73 *Stipulation on Appeal Record.*

United States District Court, Southern District of New York.

JAMES W. SMITH and Ano., etc., Libelants,

against

THE SAILING VESSEL "PERCY R. PYNE, II", etc., ONEIDA NAVIGATION Corporation, Claimant-Appellant, and W. & S. Job & Company, Inc., Impleaded, Respondent-Appellee.

It is hereby Stipulated and Agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated December 4, 1918.

HUNT, HILL & BETTS,
Proctors for Claimant-Appellant.
CARTER & CARTER,
Proctors for Respondent-Appellee.

GEO W. WHITEFIELD,
Of Counsel.
PETER S. CARTER,
Of Counsel.

74 [Endorsed:] 64-340. United States District Court, Southern District of New York. James W. Smith and Ano., etc., Libelants, against The Sailing Vessel "Percy R. Pyne, II." etc., vs. Oneida Navigation Corporation, Claimant-Appellant, and W. & S. Job & Company, Inc., Impleaded, Respondent-Appellee. Stipulation as to Correctness of Appeal Record.

75 UNITED STATES OF AMERICA,
Southern District of New York, ss.:

JAMES W. SMITH and ANO., etc., Libelants,

VS.

THE SAILING VESSEL "PERCY R. PYNE, II", etc., ONEIDA NAVIGATION, Corporation, Claimant-Appellant, and W. & S. Job & Company, Inc., Impleaded, Respondent-Appellee.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 5th day of December in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the said United States the one hundred and forty-third.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

Endorsed on cover: File No. 26,865. S. New York D. C. U. S. Term No. 779. Oneida Navigation Corporation, Claimant of the Sailing Vessel "Percy R. Pyne, 2nd," &c., Appellant, vs. W. & S. Job & Company, Inc. Filed December 14th, 1918. File No. 26,865.

Office Supreme Court, U. S.
FILED
FEB 1 1919
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 259

ONEIDA NAVIGATION CORPORATION, claimant of the Sailing Vessel "Percy R. Pyne, 2d," etc.,

Claimant-Appellant,

against

W. & S. JOB & COMPANY, INC.,

Respondent-Appellee.

MOTION TO ADVANCE CAUSE.

HUNT, HILL & BETTS,
Proctors for Claimant-Appellant,
120 Broadway,
New York City.

GEO. WHITEFIELD BETTS, JR.,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 779.

ONEIDA NAVIGATION CORPORATION, claimant of the Sailing Vessel "Percy R. Pyne, 2d," etc.,

Claimant-Appellant,

against

W. & S. JOB & COMPANY, INC.,

Respondent-Appellee.

Sirs:

PLEASE TAKE NOTICE that a motion will be made at a session of this Court to be held on the 3rd day of February, 1919, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance this cause on the docket of this Court.

Dated, New York, January 28, 1919.

Yours, etc.,

GEO. WHITEFIELD BETTS, JR.,
of Counsel for Claimant-Appellant.

To

MESSRS. CARTER & CARTER,
Proctors for Respondent-Appellee.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1918.

No. 779.

ONEIDA NAVIGATION CORPORATION, claimant of the Sailing Vessel "Percy R. Pyne, 2d," etc.,
Claimant-Appellant,
against
W. & S. JOB & COMPANY, INC.,
Respondent-Appellee.

NOW COMES ONEIDA NAVIGATION CORPORATION, Claimant of the sailing vessel "PERCY R. PYNE, 2d," appellant, by GEO. WHITEFIELD BETTS, Jr., counsel, and moves this Court to advance this cause on the docket of this Court for hearing.

Statement.

This cause comes here by direct appeal from the decree of the United States District Court for the Southern District of New York, under Section 238 of the Act "To Modify, Revise and Amend the Laws Relating to the Judiciary" approved March 3, 1911. The sole question involved is one of jurisdiction of the District Court in Admiralty. A libel was filed by Smith & Kirkpatrick against the "Percy R. Pyne, 2d" for damages to certain bales

of wool by salt water, alleging unseaworthiness of the vessel. The Oneida Navigation Corporation, claimant of the Pyne, answered the libel denying liability, and also filed a petition against respondent, W. & S. Job & Co., Inc., the appellee in this Court, alleging that W. & S. Job & Co., the owner of a certain contract with the builder of the Pyne, contracted with the appellant's assignor, one Herd, for the sale of the vessel, to be built according to a certain contract and specifications, and further agreed to supervise the construction of the vessel for a valuable consideration, and see that it was constructed in accordance with the contract and specifications, and that the said schooner was delivered to the appellant herein, Oneida Navigation Corporation, by W. & S. Job & Co., respondent-appellee, on or about February 13, 1917, and was represented to have been constructed according to such contract and specifications, and was thereafter operated by claimant-appellant, Oneida Navigation Corporation, and that the damages, if caused as alleged, were occasioned by the fault of said W. & S. Job & Company, in failing to have the vessel constructed as agreed, and by amendment to the petition, further alleging the grounds of liability of Job & Company. This petition was filed under Admiralty Rule 15 of the District Court (page 30), permitting the vouching in of a third party in admiralty after the analogy of Rule 59 of this Court in Admiralty, on an allegation of a right to a contribution or indemnity from or of fault of such third party. Exceptions were filed to this petition by Job & Company, alleging lack of jurisdiction of the Court in admiralty over the matters set forth in the petition. The District Judge sustained the

exceptions and dismissed the petition, expressly overruling (page 24) previous decisions of the Court per Judge Hough, now of the Circuit Court of Appeals, in Evans vs. N. Y. & P. SS. Co., 163 Fed., 405, and Hewlitt vs. N. Y. & Cuba Mail, filed April 7, 1916, on which decisions the general practice in the Court had been based. A final decree was entered against this appellant in favor of the respondent, Job & Company, dismissing the petition for lack of jurisdiction in admiralty and adjudging the sum of $15.00 costs against claimant.

Claimant-appellant applied to the District Judge, Hon. Learned Hand, who heard the case, for a stay of the trial of the issues between libellants Smith & Kirkpatrick and the claimant of the Pyne pending the hearing and decision of this appeal to the Supreme Court by the claimant. Judge Hand, however, refused to grant the stay, as likewise did Hon. Julian W. Mack, before whom the issues between the libellants and claimant came on for trial, and such issues have been tried over appellant's protest by the District Court at the November Term thereof and briefs were filed and decision reserved by the District Judge.

Before the trial of said issues by the District Court the claimant herein appealed from said final decree to this Court and the record on appeal has been filed in this Court and printed by the Clerk thereof.

The decision of the District Court was briefly that a third party could not be brought as a respondent under the Third Party Rules in Admiralty of the District Court, and this Court, into a cause of which the District Court had admittedly jurisdiction in admiralty where the petition alleged

as a basis for such vouching in that the third party had contracted for the sale of a vessel being constructed under certain specifications and for supervision of construction and that after the vessel was in the water as a completed schooner under such contract an engine was installed therein and certain structural changes made in the schooner under the supervision of the third party, which party was under an obligation to supervise the construction both before and after she was launched and to supervise the installation of said engine and that said third party failed in its obligations, and was under an obligation to indemnify the claimant for any damages awarded under the libel, on the ground that if any unseaworthiness existed, it was due to said third party's breach.

Heretofore the decisions of the District Court had held that where the original contract which was the subject matter of the libel was a subject of admiralty jurisdiction the contract on which the third party was vouched in need not be of itself alone one sustaining admiralty jurisdiction without the filing of a libel on the original contract, or, in other words that the original admiralty controversy was sufficient to bring under the jurisdiction of the Court an obligation of the third party to indemnify the claimant for damages awarded under the original contract. This principle was grounded largely on the power of the Court to decide the isues to avoid delay, expense and circuity of action.

Unless there should be a prompt hearing of this appeal it would appear that if the District Court decides against the claimant on the issues already tried before this appeal is decided and this Court

sustains the jurisdiction of the District Court on the third party petition the issues may have to be re-tried in order to give the third party his day in court, and if the claimant should have to pay any decree awarded by the District Court it would then be remitted to the long delay and expense of a separate action against the third party to recover the amount of said payment. This would require two Courts to pass on the same questions. The Record on Appeal herein contains only 32 printed pages. There is no question of fact involved and the argument will be necessarily brief.

Reasons for Advancement.

I.

Litigation is now pending in the District Court which will be rendered largely, if not entirely, abortive if this Court shall sustain the jurisdiction of the District Court on the third party petition.

II.

The third party practice which has become established by previous decisions of the District Court and recognized by the practice generally in the Court has been overturned by the decision of the District Court herein, and the decision of this appeal will regulate and establish such third party practice which is frequently availed of in the District Court. A prompt review of the decision is therefore of great importance to the shipping interests and the administration of the admiralty law.

III.

The prompt decision of this appeal will avoid delay, expense and circuity of action in this case.

IV.

Until this appeal is disposed of there can be no final determination of the rights of the parties to the litigation in the District Court.

V.

The decision of this appeal involves only one question of law and can be disposed of very quickly.

Respectfully submitted,

HUNT, HILL & BETTS,
Proctors for Claimant-Appellant.

GEO. WHITEFIELD BETTS, JR.,
of Counsel.

Dated, January 29, 1919.

MAR 2 1920
JAMES D. MAHER
CL

Supreme Court of the United States

OCTOBER TERM—1919.

No. 176. 259

ONEIDA NAVIGATION CORPORATION, claimant of the sailing vessel "Percy R. Pyne, 2nd," etc.,

Appellant,

vs.

W. & S. JOB & CO., INC.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLANT.

HUNT, HILL & BETTS,
Proctors for Appellant.

GEO. WHITEFIELD BETTS, JR.,
GEORGE C. SPRAGUE,
of Counsel.

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III. Even though Court finds this non-maritime contract, decree of District Court should be reversed since under allegations of pleadings appellee was required to indemnify appellants for any damages recovered by libellant against appellant or the schooner under said libel, if it appears that alleged cargo damage was caused by failure of appellee properly to supervise construction of the schooner as required by its contract 20

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Supreme Court of the United States

OCTOBER TERM, 1919.

ONEIDA NAVIGATION CORPORATION,
Claimant of the Sailing Vessel
Percy R. Pyne 2nd, etc.,
Appellant,

against

W. & S. JOB & CO., INC.,
Appellee.

No. 779

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLANT.

Statement of the Case.

This is an appeal under Section 238 of the Judicial Code from a decree dated November 4, 1918, of the United States District Court for the Southern District of New York, sustaining the exceptions of W. & S. Job & Co., Inc., to the petition and

amended petition of the appellant, dismissing said petition and amended petition on the ground that the court had no jurisdiction, and entering judgment against the appellant in favor of said W. & S. Job & Co., Inc., for the sum of $15.00 costs. The facts are these: The original libel was in rem against the schooner Percy Pyne 2nd for alleged damage to a cargo of wool transported by said schooner from Port Elizabeth, Africa, to Boston, Mass., which alleged that said schooner was unseaworthy, in that

> "she was inadequately and insecurely constructed, and after her construction her strength had been greatly impaired by the cutting away of her timbers and frame for the installation of an auxiliary engine" (page 1).

The appellant claimed the vessel as owner and answered the libel (pages 3 and 4), and thereafter upon the consent of the court filed a petition and amended petition to bring in W. & S. Job & Co., Inc., as a party respondent, under the 59th Admiralty Rule of this court and the 15th Admiralty Rule of the District Court for the Southern District of New York (pages 7 and 19). This petition alleged, among other things, that W. & S. Job & Co., Inc., then being the owners of a certain contract with one R. L. Bean for the construction of a schooner then in the course of construction, and owners of a certain contract with the Belinders Company for an engine for said schooner, entered into an agreement with one Anderson T. Herd, petitioner's assignor, by which it agreed to sell said schooner as constructed according to said certain

contract and specifications referred to in said agreement to petitioner's assignor, and further agreed for an additional consideration to supervise the construction of such schooner, and to see that it was constructed according to the contract and specifications referred to therein; that said contract was thereafter assigned to the petitioner; that in accordance with the provisions of said contract said schooner was constructed under the supervision of W. & S. Job & Co., Inc., was launched as a fully completed schooner, and thereafter the engine mentioned in said agreement was installed, and certain structural changes were made in said schooner to accommodate said engine, all under the supervision of Job & Co., pursuant to said contract; that thereafter said schooner was delivered to petitioner by Job & Co., who represented to the petitioner that said schooner had been constructed and supervised by it according to said agreement, and that if the damages alleged in the libel actually occurred, then said damage was due to the fault of Job & Co. in not fulfilling the obligations placed upon it by said contract, and in particular by its failure to supervise the construction of said schooner according to the provisions of the contract and specifications, and to have said schooner properly constructed and fastened, and to have said engine installed without weakening the strength of the schooner, and that if the petitioner was liable to the libellant for the damages alleged in the libel, that then W. & S. Job & Co. was under obligation to indemnify the petitioner by reason of said contract.

W. & S. Job & Co., Inc., excepted to the petition on the ground that it did not disclose any admir-

alty cause of action against said company, and that the District Court, sitting in admiralty, did not have jurisdiction of the subject matter of the petition, and the said exception was sustained by the court and a decree entered dismissing the petition, with costs, on the ground

> "that the petition and amended petition does not set forth matters within the admiralty jurisdiction of this court" (page 21).

The sole question involved being that of the jurisdiction of the District Court in admiralty, the appellant appealed directly from said decree of the District Court of November 4, 1918, to this court under Section 238 of the Judicial Code.

Specification of Errors.

The appellant assigns the following as errors on which it relies on this appeal.

The District Court of the United States for the Southern District of New York erred:

1st. In sustaining the exceptions and each of them to the said petition and amended petition.

2nd. In holding that the allegations of said petition and amended petition did not disclose any cause of action of admiralty and maritime jurisdiction.

3rd. In adjudging and decreeing a dismissal of the said petition and amended petition.

4th. In holding that the said court had no jurisdiction to entertain the said petition and amended petition, and to award the petitioner the relief therein prayed for.

5th. In holding that said court sitting as a court of admiralty had no jurisdiction to bring in W. & S. Job & Co., Inc., as a third party respondent, because the contract with said respondent set forth in the petition and amended petition was not essentially maritime.

6th. In not holding that after the completion and launching of the said schooner Percy R. Pyne, 2nd, the installation of the engine and the structural changes in the frame of the schooner therefor, and the supervision thereof by said respondent, as alleged in the petition and amended petition, were essentially maritime in their nature, and gave said court, sitting in admiralty, jurisdiction to entertain the petition and amended petition.

7th. In holding that on the facts set forth in the petition and amended petition there could be no recovery over against said respondent, W. & S. Job & Co., Inc., in this action, and that said W. & S. Job & Co., Inc., could not be brought in as a third party respondent, notwithstanding admiralty rules 59 of this court and 15 of the District Court for the Southern District of New York.

8th. In entering judgment against the appellant in favor of said W. & S. Job & Co., for the sum of $15.00.

Brief of the Argument.

POINT I.

The contract between appellant's assignor and W. & S. Job & Co., Inc., was a maritime contract.

Since the case of People's Ferry Company vs. Beers, 20 How., 393, the rule has been well established that a contract for the building of a ship is non-maritime in character. The contract between the appellant and W. & S. Job & Co., however, was not solely for the building of a ship. A copy of this contract is attached to the petition (pages 10, et seq.) from which it appears that the schooner was under construction at the time that the contract in question was made, and that the construction thereof was to be completed according to the terms of said contract and specifications referred to therein under the supervision of W. & S. Job & Co., for which construction supervision service Job & Company were to receive the sum of $1,000 in addition to the price at which the vessel was contracted to be sold. The contract also provided that an auxiliary engine was to be installed in the schooner also under the supervision of Job & Co., and it appears from the amended petition (page 18) that the schooner was launched and placed in the water as a completed schooner after the installation of her masts, spars and sails, and that thereafter, and while said schooner was in the water, this engine and its appurtenances were installed in the schooner, and certain structural changes made in the frame thereof for its accommodation.

These structural changes made for the purpose of installing this engine by W. & S. Job & Co., are specifically referred to in the libel as one of the causes of unseaworthiness of the vessel leading to the damage for which the libel was brought (page 1).

The appellant contends, therefore, that the clause in said contract, providing for the supervision of the construction of this schooner by the appellee was maritime in character, since it contemplated the installation of an engine in the schooner after the launching of said schooner, while she was in the water as a complete and finished sailing ship, an entity in herself, and ready for commerce. There are numerous decisions of the Federal Courts involving contracts for the change of character of a completed ship from one type to another after the ship had been placed in the water and before it had entered upon its service, in which cases the courts have uniformly ruled that the contract for said change was a maritime contract.

The Eliza Ladd, Fed. Case No. 4366, in the District Court for Oregon, was a case of a steamer that had been launched at Portland Oregon in the autumn of 1874, but was without propelling machinery, and thereafter, in the spring of 1875, a boiler and engine which had been removed from an old ferry boat were placed on board the hull of this vessel, and the vessel was towed to the libellant's yards, where a contract was entered into with the libellant to install said engine and boiler in the boat. The court held that the contract with the libellant for the installation of the boiler and engine was a maritime contract, saying:

> "A contract to equip, fit or furnish a vessel, after she is launched and afloat, is a maritime contract."

This case was followed in *Revenue Cutter No. 2*, Federal Case 11,714, in the same jurisdiction.

In the *"Manhattan,"* 46 Fed. Rep., 797, District Court, District Washington, N. D., 1891, it appeared that the libellant had built the vessel and launched her upon Lake Washington under contract with persons who intended to operate said vessel upon the lake, but who failed to pay the libellant for the construction according to their contract. The libellant therefore sold the vessel to other parties in the condition in which she then was, i. e., a mere hull without masts, sails, machinery or other propelling power. The purchasers towed the hull to Seattle to another shipyard owned by the libellant, and entered into a new contract with libellant for the changing of this vessel from a side wheel steamer to a propeller, which changes were made. The action was for the cost of said changes made after the vessel had been towed to Seattle. The claimant alleged a purchase of the vessel from the parties who had contracted for the changes with the libellant, and urged that the court had no jurisdiction, as the contract sued on was not maritime, and not cognizable in admiralty. The court held that there was a distinction between this character of cases and those merely for the construction of a vessel and entered a decree for the libellant, saying:

> "And my conclusion is that, if there is any reason for the distinction other than the mere

fact that it exists because the courts have created it by their arbitrary decisions, it is to be found in this: that a maritime contract is defined to be one having reference to commerce or navigation. The particular element essential to give it a maritime character is direct connection with commercial transactions or navigation; and such connection is lacking in a contract to create a new ship, or, if not lacking entirely, it is remote and contingent, so that it is not perceptible at the time the contract goes into effect as a binding obligation, but whatever is done to or about an existing ship has direct reference to commerce and navigation. A ship *in esse*, as a maritime subject gives a maritime character to all transactions directly connected with it. * * * After a new ship has been launched and embraced by the element upon which she is intended to float and been christened and become an entity, fully capable of being identified, she is as much a subject of admiralty and maritime jurisdiction, as she can be at any later period of her history; and contracts then entered into relating to her completion, equipment or employment are maritime and cognizable in admiralty."

The *L. B. X.*, District Court W. D. Mo., C. D., 1899, 93 Fed. Rep., 233, was a libel in rem for the furnishing of an engine and appurtenances by the libellant to the vessel. It appeared that the vessel had been launched and navigated for a short time with another engine, which had not proved satisfactory, whereupon the vessel was placed in libel-

lant's yard and the new engine was substituted for the one with which the vessel had been originally equipped. The claimant contended that the contract for furnishing the new engine was not a maritime contract, but the court held otherwise relying upon the Eliza Ladd, supra, and the Manhattan, supra.

Indeed in *Tucker* vs. *Alexandroff*, 183 U. S., 424, at 437, this court established the principle once and for all that when a ship was once launched she became a subject of admiralty jurisdiction, saying (pages 437, 438):

> "1. At the time Alexandroff arrived in Philadelphia, the Variag was still upon the stocks. Whatever be the proper construction of the word under the treaty, she was not then a *ship* in the ordinary sense of the term, but shortly thereafter and long before Alexandroff deserted, she was launched, and thereby became a ship in its legal sense. A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforcible in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the

name of her owner, and be sued in her own agents, and her agents may not be her owner's agents. The China, 7 Wall., 53, Thorp vs. Hammond, 12 Wall, 408; Workman vs. New York City, 179 U. S., 552; The Little Charles, 1 Brock., 347, 354; The John G. Stevens, 170 U. S. 113, 120; Homer Ramsdell Co. vs. Comp. Gen. Trans., 182 U. S., 406. She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a *quasi* bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale. We have had frequent occasion to notice the distinction between a vessel before and after she is launched. In The Jefferson, People's Ferry Company vs. Beers, 20 How, 393, it was held that the admiralty jurisdiction did not extend to cases where a lien was claimed for work done and materials used in the construction of a vessel; while the cases holding that for repairs or alterations, supplies or materials, furnished after she is launched, suit may be brought in a court of admiralty, are too numerous for citation."

In *The Raithmoor,* 241 U. S., 166, at page 176, this court said:

"Again, an analogy is suggested to the case of a vessel which is being constructed on shore, but the argument falls short, as it is to be remembered that as soon as a vessel is

launched, although still incomplete, it is subject to the admiralty jurisdiction. Tucker vs. Alexandroff, 183 U. S., 424, 438.

Thus expressly re-stating the proposition that admiralty jurisdiction exists over an incomplete ship as soon as she is launched.

It is respectfully submitted that the present case is similar to the cases cited above, and that the rule therein stated should govern, inasmuch as the contract with Job & Co., so far as the installation of the engine was concerned, was a contract to change the character of a vessel built as a sailing vessel, and it being an entity in itself, capable of being identified prior to the time of the installation of said engine. While it is true that nothing appears in the record to show how far the construction of the schooner had proceeded at the time of the execution of the contract between the appellant's assignor and the appellee, it is, however, apparent that a considerable amount of progress had been made in the construction of said schooner because the contract between appellee and Bean, the builder, was signed March 20, 1916 (page 12), and the vessel was to be delivered not later than October 15, 1916, the intention of the builder being stated to be to deliver during September, 1916 (page 15). The contract between the appellee and appellant's assignor was made on August 30, 1916 (page 10), or nearly 5½ months after the signing of the contract between the builder and the appellee, and only a month and a half prior to the date set for the delivery of the vessel under said contract. Moreover, the original libel

sets forth as one of the causes of unseaworthiness that after the construction of the schooner its strength had been impaired by the cutting away of her timbers and frame for the installation of an auxiliary engine (page 1), and this is admitted to have been done after the vessel was launched and completed as a schooner (pages 18-19). It appears from the agreement between the appellee and Bean, the builder, that what was contemplated at the time of said contract was a schooner without auxiliaries, and that the question of putting in an auxiliary engine was in the nature of an after thought, arranged for by separate contract, and required the changing of the frame of the vessel after it had been launched for the purpose of installing said auxiliary. The contract between appellant and appellee was therefore not a contract for the building of a vessel, nor for the sale of a vessel, but was more than either. It was made at a time when said vessel was practically completed as a sailing vessel, required the appellee to cause said vessel to be completed in accordance with the specifications and plans referred to in said contract, and moreover required appellee to supervise the installation of the auxiliary engine in said vessel, which, it appears, was done after the vessel was launched and was complete as a sailing vessel.

It is therefore respectfully submitted that in view of these facts and of the decisions heretofore mentioned, that the present contract between the appellant and the appellee was a maritime contract, and within the jurisdiction of the admiralty court.

POINT II.

The modern judicial tendency is to extend the doctrine of admiralty jurisdiction to all those subjects which are instruments of, aids to, or pertain to navigation and commerce by sea, or can be said to be maritime in their nature.

Years ago this court held in *The Lottawanna*, 21 Wall, 558, at 574 and 575, that our Admiralty Courts were not bound within the narrow limits of the Admiralty Courts of England, saying (page 576):

> "Guided by these sound principles, this court has felt itself at liberty to recognize the admiralty jurisdiction as extending to localities and subjects which, by the jealousy of the common law, were prohibited to it in England, but which fairly belong to it on every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers, especially as the narrow restrictions of the English Law had never prevailed on this side of the Atlantic, even in colonial times."

In the Blackheath, 195 U. S., 361, argued for the United States, appellant, by Mr. Justice McReynolds, then Assistant Attorney General, this court said:

> "As to history, while as is well known the admiralty jurisdiction of this country has not

been limited by the local traditions of England, the Lottawana, 21 Wall, 558, et seq., the traditions of England favor it in a case like this."

The Blackheath had struck and injured a beacon 15 or 20 feet from the channel of Mobile River in water 12 or 15 feet deep and built on piles driven into the bottom. The District Court had dismissed the libel on the ground that there was no jurisdiction because the beacon was attached to the realty and was a part of it. That this general doctrine had heretofore been laid down by the lower federal courts at that time may fairly be assumed. For example, wharves, elevators and other structures built over the water upon piles driven into the bottom were held to be part of the realty and not the subject of admiralty jurisdiction when injured by vessels. In the Blackheath, this court looked beyond the technical point of attachment to the bottom, and took the broad view that the beacon was an aid to navigation, and as such pertained to navigation and commerce, and that the admiralty jurisdiction ought not to be defeated by such technical and narrow considerations, and could be exercised without transcending the limits of the constitution. Indeed, Justice Brown, concurring in the decision (page 368), accepted the decision as practically overruling the former and narrower early ones, holding that the earlier distinction was somewhat artificial and founded upon no sound principle, and that the fact that Congress under the constitution could not extend our admiralty jurisdiction afforded an argument for a broad interpretation commensurate with the needs of modern commerce. To the admiralty bar in general in

this country we think it is fair to say the Blackheath appeared to be a step in the right direction in the doctrine of admiralty jurisdiction, and as it were itself a beacon to shed forth light to courts and litigants treading the interesting and sometimes tortuous paths of the admiralty jurisdiction.

In the *Raithmoor*, 241 U. S., 166, this court took a further step forward. In that case the Raithmoor damaged a structure which the appellant was erecting for the Government to serve as a beacon on the edge of a channel that had not been made ready and with a temporary platform built around the structure as an aid to the work, all resting on piles driven into the bottom of the river. Again the narrow jurisdiction of the admiralty was urged, and the cases relying on attachment to the land were cited. In addition the claimant argued that an unfinished structure could not be an aid to navigation, and was an obstruction and source of danger; that the temporary platform could not be maritime in its character or an aid to navigation; and the constitutional objection was urged; that the jurisdiction of the federal courts in admiralty is given by the constitution and cannot be added to by Congress, and if a subject is not within the grant the courts can take no cognizance of it, whether connected as to time and place with others over which they clearly have jurisdiction.

In opposition the libellant urged by analogy that courts of admiralty had taken jurisdiction for damages to the following structures:

> "Submarine cables resting on the bottom of navigable water, notwithstanding connection of the ends with the shore. Postal Tel. Co., vs.

Ross, 221 Fed. Rep., 105; The William H. Bailey, 100 Fed. Rep., 115; S. C., 111 Fed. Rep., 1006; The Anita Berwing, 107 Fed. Rep., 721; The City of Richmond, 43 Fed. Rep., 85; S. C., affirmed, 59 Fed. Rep., 365; Stephens vs. West. Un. Tele. Co., 8 Ben., 502.

Temporary platform structure resting on girders sunk into the bottom of navigable waters. The Senator Rice, 122 Fed. Rep., 331.

Injury to a person on a pontoon fastened to the shore by a cable and used as a landing in connection with a ferry. The Mackinaw, 165 Fed. Rep., 351.

Floating bath-house moored to the shore by poles and chains. The M. R., Brazos, 10 Fed. Cas., No. 9898.

Floating drydock moored to a wharf. Simpson vs. The Ceres, Fed. Cas., 12, 881.

Raft of logs in tow of tug in navigable waters. The F. & P. M., 33 Fed. Rep., 511.

Fish nets extending out from the shore into navigable waters. The Armorica, 189 Fed. Rep., 503.

Steel brooms thrown into navigable water through the breaking down of defective wharf. The City of Lincoln, 25 Fed. Rep., 835, but see contra, Martin vs. West, 222 U. S., 191.

Salvage by a tug in extinguishing a fire on a steamship in drydock undergoing repairs. The Steamship Jefferson, 215 U. S., 130.

Hire of a dredge while engaged in a partly land transaction in dredging material from a navigable stream for the purpose of piping it onto the land in aid of a land project. Bowers

vs. Federal Contracting Co., 148 Fed. Rep., 290.

Repairs to an intrastate canal boat in dry-dock. The Robert W. Parsons, 191 U. S., 17.

Injury to a floating elevator anchored to and moving up and down upon wooden spuds imbedded in the mud under navigable waters. The Frank R. Gibson, 87 Fed. Rep., 364."

These cases show the gradual extension of the admiralty jurisdiction to subjects pertaining to maritime affairs.

The District Court held that there was no jurisdiction in the admiralty of the claim against the Raithmoor for damage to the incomplete structure and platform (186 Fed. Rep., 849); that if the structure had been a completed beacon the case would fall within the ruling of the Blackheath and the Admiralty would have had jurisdiction; that such a distinction based solely on non-completion would be a needless refinement; that the location and purpose of the structure were controlling; saying at page 176:

> "Again, an analogy is suggested to the case of a vessel which is being constructed on shore, but the argument falls short as it is to be remembered that as soon as a vessel is launched, although still incomplete, it is subject to the admiralty jurisdiction. Tucker vs. Alexandroff, 183 U. S., 424, 438."

This court then directed that the decree of the District Court, so far as it dismissed the libel for want of jurisdiction, be reversed and sustained the jurisdiction not only over the incomplete structure

but over the temporary platform, observing that that was a mere incident to the structure and as such the jurisdiction would extend to the claim for damage to it.

Thus it would seem the admiralty jurisdiction was further extended by this court beyond the point which it had reached in the lower courts, and the doctrine further laid down that where a part of the claim was incidental to the main subject, admiralty would exercise jurisdiction over it, even where it would not exercise jurisdiction over such part standing alone.

In *The Robert W. Parsons,* 191 U. S., 17, this court held that admiralty jurisdiction extended to an action for repairs on a vessel while in dry dock, but the question whether this would apply to a vessel hauled up on land for repairs was reserved.

In *North Pac. SS Co.* vs. *Hall Bros. Co.,* 249 U. S., 119, the very question reserved in the Robert W. Parsons was presented, and this court held that a contract for maritime service is within the admiralty jurisdiction, although not to be executed upon navigable waters, and that the admiralty jurisdiction extends to a claim for labor and materials to repair a vessel hauled out on land on a marine railway. Again this court at page 127 expressly approved of the doctrine laid down in Tucker vs. Alexandroff that a ship when she is launched becomes subject to the admiralty jurisdiction, quoting the relevant part of the opinion in that case.

POINT III.

Even though the court finds that the contract between appellant and appellee was a non-maritime contract, the decree of the District Court should be reversed since under the allegations of the libel, petition and amended petition the appellee was required to indemnify the appellant for any damages recovered by the libellant against the appellant or the schooner under said libel, in the event that it appears that the alleged cargo damage set forth in the libel was caused by failure of appellee to properly supervise the construction of the schooner, as required by its contract with the appellant.

The libel was for damage to a cargo of wool, and alleges that the vessel was

> "unseaworthy and unsuitable for a voyage and for carriage of cargo of the character intended. Among other causes of unseaworthiness, she was inadequately and insecurely constructed, and after her construction her strength had been greatly impaired by the cutting away of her timbers and frame for the installation of an auxiliary engine" (page 1).

The appellee under its contract with appellant was obligated to see that the vessel was built according to the specifications referred to therein,

and was to receive a special payment of $1,000.00 for such consruction supervision services (page 11) in addition to the purchase price of the vessel as agreed between the parties. In the event that it is shown that the schooner was not built according to the specifications referred to in said contract, the present appellant could recover from the present appellee any general damages that it might suffer due to the failure to construct this vessel according to specifications inasmuch as the supervision of the construction had been left to the appellee, and could include in such damages any sum that it was required to pay in a cargo damage case, such as that included in the libel herein, upon showing that said damage to cargo was caused by the failure to build the schooner according to specifications. In other words, the appellant would be entitled to indemnification for such loss from the appellee. It is submitted that it is not necessary for the appellant to set forth in his petition facts to show that had the schooner been built according to original specifications, that the damage would not have occurred, or even necessary to set forth that the damage was due to negligent supervision of the construction, as long as it pleads generally that said damage was due to acts of the appellee, as it has done. This damage occurred on the first voyage of the vessel, after her delivery by the appellee to the appellant.

Admiralty Rule 15 of the District Court of the United States, for the Southern District of New York, provides that a defendant by petition on oath who alleges

> "fault in any other party in respect of the matters complained of in the libel, or shall allege

> that he is entitled to contribution or indemnity from any other party in respect of such matters, and shall pray that such other party be brought into the suit as a party defendant in analogy with provisions of admiralty rule 59 of the Supreme Court, process on such petition may be issued and the cause shall proceed otherwise as in cases under the 59th rule" (page 30).

The appellant in its petition and amended petition complied strictly with this rule, alleging fault in the appellee by reason of which it was entitled to indemnity from the appellee in case it was held liable in the action brought against it, and that therefore the appellee was a necessary and proper party to be before the court (pages 18-19). The question for decision is, therefore, whether admiralty rule 15 of the District Court is to be restricted to those cases where a separate action in admiralty could be brought by the petitioner against the party sought to be impleaded or whether it applies in any case where the petitioner has a right over against the person sought to be impleaded. This point as far as we are able to ascertain has never been directly before this court for decision.

The 59th Admiralty Rule of this court was promulgated March 26, 1883 (112 U. S., 743) following the decision of Judge Brown in The Hudson, 15 Fed., 162. This was a collision case in which the claimant of the steam tug "Hudson" filed a petition, to bring in as a party to the action the steam tug "Packer" which was not joined in the libel. The Admiralty rules of the Supreme Court not then providing for the case as presented, the court under

its powers to regulate its practice "in such manner as it shall deem most expedient for the due administration of justice" granted the petition. The theory of the case is based upon the fact that in the event the Hudson was found liable it would have an action over against the Packer, and would be entitled to contribution or an apportionment of damages if the Packer were found equally liable.

The 59th Admiralty Rule of this court gives the right to bring in a party jointly liable in collision cases, and does not extend that right further. The District Court for the Southern District of New York however, under its power to regulate its practice where said practice is not prescribed by the Rules of the Supreme Court, has provided by Admiralty Rule 15 that in all cases where the party respondent is entitled to contribution or indemnity from any other party for matters complained of in the libel that he may bring in such other party by petition in analogy with the provisions of Admiralty Rule 59 of the Supreme Court, and the practice in the District Court for the Southern District of New York under this rule has been to allow such parties to be brought in by petition in all cases where a right to indemnity or contribution can be shown. This rule and the latest decisions thereunder have come as a result of the gradual development of the principle laid down by Judge Brown in *The Hudson,* supra.

In the *City of Lincoln*, 25 Fed., 825, District Court, Southern District, New York, Judge Brown granted a petition bringing in the owners of a wharf as parties respondent upon the analogy of the 59th rule in admiralty, where the libel was against the steamship "City of Lincoln," to recover for damages done to certain steel-blooms in

their discharge from the steamship upon the wharf of the impleaded party, where the petition showed that the steel-blooms were damaged because the wharf broke down due to the negligence of the wharfingers. Judge Brown, in granting the motion, stated:

> "If such a tort is a marine tort, the court has jurisdiction; otherwise not."

but that the jurisdiction was not so limited in contract cases appears from his opinion in *"The Alert,"* infra.

In *Joice* vs. *Canal Boats*, No. 1758 and 1892, 32 Fed. Rep., 553, District Court, S. D. N. Y., the libel was for a collision of libelant's vessel with two canal boats which had been sunk near a dock. The claimants of the canal boats filed a petition to bring in as parties respondent the proprietors of the dock, where said canal boats had been moored, alleging that

> "It was because of the negligence of the proprietors of said dock that said canal boats had been sunk, and had become the cause of the damage to the libellant's boat."

Judge Brown granted the motion, stating in regard to the 59th Rule:

> "Its object is remedial. It should be liberally applied therefore to cases that clearly fall within its general scope and purpose."

In *The Alert*, 40 Fed., 836, District Court, Southern District of New York, the Alert was

sued in rem for negligent damage to cargo caused by the breaking of her tackle while discharging the same. The owners as claimants petitioned to have the charterers brought in as parties respondent, on the ground that they furnished the tackle. Judge Brown granted the petition, stating the rule as follows:

> "Its propriety does not depend upon the form of the action, whether it be in contract or in tort, but on the essential reasons for it, viz: The due administration of justice; to prevent circuity of action and a multiplicity of suits upon the same question; to secure a thorough hearing upon full evidence as to the facts; to prevent divers or contradictory decisions upon the same subject, involving necessarily, injustice to some of the parties. The difficulties in the way of such a procedure as the present, in cases arising on contract, where the third parties brought in may be liable to indemnify the others, are less than in cases of tort, where, for the most part, there is no right to compel contribution."

It is respectfully submitted that what Judge Brown meant by the above quoted statement was that where a third party was liable to indemnify the claimant by virtue of a contract, that there was no reason for failing to apply the rule and to bring said party in by petition where there might be a reason for not applying the rule in a case where the liability over was due to a tort, inasmuch as at common law there was no right to contribution between joint tort feasors. The reading of this case in connection with the case of the City

of Lincoln, supra, would lead one to believe that Judge Brown's statement in the City of Lincoln that the tort must be a marine tort in order for a third party to be brought in by petition was perhaps based upon the ground that otherwise the party sought to be impleaded would be held liable to *an action* where the common law gave no liability. The case of the Alert was cited with approval by this court in the *Barnstable*, 181 U. S., 464.

In the Centurian, 57 Fed. Rep., 412, Dist. Court, S. D. N. Y., which was an action in rem for cargo damage, the owners of the vessel as claimants were allowed to bring in the charterers of the vessel by petition, alleging that there was no fault or negligence of the owners, and if there was any negligence, it was that of charterers, and that the latter were personally bound to indemnify the ship owners against the loss arising from such negligence. A writ of prohibition was denied by this court in *In Re New York & Porto Rico Steamship Company*, 15 Sup. Ct. Rep., 183, 155 U. S., 523.

In *The Public Bath*, No. 13, Dist. Ct., S. D. N. Y., 61 Fed. Rep., 692, there was a libel for salvage services rendered to the Public Floating Bath, No. 13, the property of the City of New York. On petition of the City of New York the Green Point Towage & Lighterage Company was brought in as a party respondent, on the allegation that said floating bath house had gone adrift and thus salvage services had become necessary because of the negligence of said Green Point Towage & Lighterage Company. The court allowed the petition on the ground that the impleaded party was bound to indemnify the City.

Salisbury vs. 70,000 *Feet of Lumber*, District Court, S. D. N. Y., 68 Fed. Rep., 916. While the

reported decision in this case does not show the facts upon which Burroughs was brought in as a party respondent by the petition of claimant, Judge Hough, now Circuit Court Judge in the Second Circuit, who was then proctor for Burroughs' states that he excepted to said petition on behalf of his client and urged that admiralty did not have jurisdiction and the petition should not be granted because a cause of action in admiralty did not presently exist against said client but that his contention was not sustained. See opinion of Judge Hough in *Evans* vs. *N. Y. & P. S. S. Co., Ltd.*, District Court, S. D. N. Y., 163 Fed., 405 (408). The Judge before whom this case was tried was Judge Brown, and Judge Hough's statement would corroborate the point already made in reference to the case of the Alert, supra, namely, that Judge Brown had never taken the stand that in a contract case the party could not be brought in by petition, except where a cause of action in admiralty could at once have been brought against him, but that his decisions in such cases were based simply upon the right of indemnity by the claimant against such respondent.

Hastorf vs. *Hudson River Stone Supply Co.*, 110 Fed., 669.

This was a libel to recover a balance of charter hire and also damages sustained by libellant's scow, which was crushed by certain elevated stone bins, under which it lay, in the service of the respondent, giving way and falling upon it. The respondent, who was charterer of the scow, filed a petition to bring in the owners of the bins as parties respondent, and this was allowed.

Dailey vs. *The City of New York*, 119 Fed., 1005, District Court, S. D. N. Y.

This was a libel in personam against the City as owner of the scow "D." The City alleged by petition that the scow was cast adrift by the negligence of other parties, and asked that they be brought in as parties respondent. Judge Adams granted the motion, stating that the purpose of the rule was

> "to assist in the administration of justice by requiring the appearance of any additional defendant who may be responsible for the claim or a part thereof."

The Crown of Castile, District Court, S. D. N. Y., 148 Fed., 1012. In this case, which was in rem for non-delivery of cargo, all of which was received and loaded by the charterer, the claimant was allowed to bring in the charterer by petition as party respondent. Judge Adams said:

> "It was to avoid a multiplicity of actions that the rule was established in collision cases, and has been extended by analogy to many other causes of action, of which it seems that this should be considered one."

The Cerea, 149 Fed., 924, Dist. Ct. S. D. N. Y. This was an action for wrongful delivery of cargo to which libellants were entitled as bankers, who advanced money on the security of bills of lading covering said cargo. It appeared that said cargo was delivered to the parties named as consignors upon forged bills of lading. The claimants, as

owners of the ship, were allowed to bring in the parties receiving delivery of these goods as parties respondent. Judge Adams said (page 927):

> "It would seem that if the libellants are entitled to recovery against the vessel on the theory of improper delivery, that the claimant may have a right of recovery against the parties sought to be brought in, who, it is alleged, obtained possession of the goods or their proceeds. It would be consistent with the practice of the court under the analogy of the 59th Rule to have all parties before it, so that complete justice can be rendered in one action."

The No. K 1, Circuit Court of Appeals, Second Circuit, 150 Fed. Rep., 111. The original libel was for salvage. The claimant filed a petition to bring in Moran, who had been hired to tow the scows in question from one pier to another, and who it had alleged had left them improperly tied, so that they broke away and the salvage services became necessary. Circuit Court Judge Lacombe held that the District Court in sustaining said petition committed no error.

Evans vs. *N. Y. & P. S. S. Co., Ltd.*, 163 Fed., 405 (Dist. Ct., S. D. N. Y.).

In this case the libellant was the owner of rubber laden on the SS. Capac, belonging to the respondent steamship company. The rubber was discharged from the ship at noon of Saturday, June 3rd, and put in an adjacent warehouse belonging to the respondents Beards. The warehouse was closed by Beards' employees, and remained closed until the following Monday, when it was opened by

Beards' employees and the discovery made that a considerable quantity of the libellant's rubber had disappeared. The goods were not stored for libellant's account by the steamship company, and nothing was done by it to terminate or change its carrier's liability. Beards was joined as a party respondent in the original libel, but objected to the jurisdiction on the ground that admiralty had no jurisdiction over the cause of action against him. A decree was entered for the libellant against both respondents, with a direction to collect first from the Beards. This case is directly in point with the case at issue. We quote extensively from the opinion of District Judge Hough, now Circuit Judge, at page 407:

> "Whether, however, the warehousemen are liable in admiralty presents a question not in my opinion finally settled by authoritative decision. Nevertheless, under the settled practice of this court, I cannot dismiss the libel as against the Beards. It seems clear that neither the libellant nor the steamship company could have maintained an original suit in admiralty against the Beards, because the negligence resulting in the disappearance of the rubber from the land warehouse did not give rise to a maritime tort, and neither was the contract between shipowner and warehousemen a maritime contract. Having found, however, that the carrier is responsible to the libellant, the former clearly has his remedy over against the warehousemen, and, in order to prevent circuity of action and multiplicity of suits, it would have been, under our practice,

competent for the shipowner to have petitioned the warehousemen into this proceeding, and, if this could have been done, no reason appears why the warehousemen may not be proceeded against as an original respondent. It is generally considered that the fifty-ninth rule grew out of the decision of Brown, J., in The Hudson (D. C.) 15 Fed. 162. The reason for the rule, as put by the same judge in his return to petition for writ of prohibition in re New York, etc. SS. Co., 155 U. S., 525; 15 Sup. Ct., 183; 39 L. Ed., 246, is that he who is 'primarily liable and bound to indemnify' shall be brought into the original action in order that the rights of all parties interested in the same occurrence shall be adjudicated in one proceeding. It was on this principle that The Alert (D. C.) 40 Fed., 836, was decided, and cited with approval in The Barnstable, 181 U. S., 467; 21 Sup. Ct., 684; 45 L. Ed., 944. • • •

"More recently, the rule has been stated in this court as 'requiring the appearance of any additional defendant who may be responsible for the claim or a part thereof.' Dailey vs. City of New York (D. C.), 119 Fed., 1005. This rule has been very frequently applied in unreported matters, and within a few days stated as authorizing anyone against whom a right of action ever exists on the part of the original respondent or claimant to bring in such other person that 'all the matters can be disposed of in one trial.' The Crown of Castile (D. C., N. Y., Dec. 6, 1906), 148 Fed., 1012.

> "Solely, therefore, upon the ground that the Beards are bound to indemnify one who is liable in admiralty, I retain this libel against them."

The rule laid down in *Evans* vs. *N. Y. & P. S. S. Co.*, supra, has also been enunciated in several unreported cases, especially in *Hewlett* vs. *N. Y. & Cuba Mail, N. Y. Dock Company* impleaded, decided in the United States District Court, Southern District of New York, by Judge Hough, April 7, 1916, and in *Lorna Fruit Company* vs. *Warren & Co.*, decided by Judge Mayer of the United States District Court for the Southern District of New York, May 31, 1916, and November 24, 1916.

In *Hewlett* vs. *N. Y. & Cuba Mail*, supra, Judge Hough said:

> "It is a doubly interesting question whether the equity of admiralty rule fifty-nine covers the case of bringing into a suit in admiralty parties other than the libellants and respondents, who may be secondarily or ultimately liable as indemnitors or in exoneration of those originally sued, or some of them, without regard to the possibility or certainty that neither the libellant nor the petitioning party could have originally sued the third party in admiralty. It is desirable to avoid circuity of action, to minimize and consolidate litigation if the law is a science and not a trade. It has been done in this case and in the Evans case, and will be done in the future. It is now being attempted and most interestingly under modernized practice of the New York courts,

so that whether the time has arrived for doing it in admiralty is a true way of stating the question."

It is submitted that the decision of Judge Hough in Evans vs. N. Y. & P. SS. Co., Ltd., supra, is merely the logical developement of the rule laid down by Judge Brown in the Hudson, which rule has been often approved by this court, and is well founded, and that it should be upheld as the rule applicable to the case at issue. It is a rule that has commended itself to the Admiralty Bar of the Second Circuit as avoiding circuity of action and minimizing litigation without interfering with the substantial rights of the litigants. It has also been approved by leading text workers.

In Benedict's Admiralty, 4th Edition, at pages 277 and 278, the following statement appears:

"The 59th Rule in terms confines the practice to collision cases. But the case of The Hudson which led to the adoption of that rule was itself based upon no rule, but only upon the inherent power of a court which has jurisdiction of a cause to bring into the suit other parties whose presence would enable the court to do substantial justice in regard to the entire matter, and acting upon the same inherent power the courts have extended the practice to many other cases besides cases of collision, until it has been said that the principle is applied by analogy to assist in the administration of justice by requiring the appearance of any additional defendant who may be responsible for the claim or a part thereof. This

has resulted in the anomaly that a defendant who could not be originally sued in the admiralty may by this procedure be brought into an admiralty suit and be there held liable. Whether such an extension of the theory of Rule 59 will meet with the approbation of the Supreme Court or not remains to be seen. It is to be hoped that it will have in spite of the occasional anomaly above mentioned. There is no doubt but that the general practice is an aid to speed and substantial justice among all parties to such controversies."

We believe that the rule enunciated by Judge Hough in the Evans case is well substantiated by principles already laid down by this court and followed for many years in admiralty jurisdiction. It is a familiar and well established principle of the Court of Admiralty that once the court has jurisdiction of the suit and "possession of the principal cause, it will exert itself over all the incidentals and collateral questions."

In *The Dove*, Fed. Case 4035, Circuit Court for the District of Massachusetts, the court having jurisdiction of the cause under the libel filed by a prize captor, held that it had jurisdiction over a petition filed by claimant, alleging an embezzlement of the cargo by the prize captor, even though the prize captor thereupon withdrew his libel, and contested the jurisdiction of the court, and could give a decision in favor of the claimant against the original libellant because of said wrongful abstraction of the cargo.

In *The Electron*, 48 Fed. Rep., 689, District Court, S. D. N. Y., the original libel was for repairs

to the yacht "Electron." A cross libel was filed by the respondent, alleging misrepresentations leading up to the contract for said repairs and the breach of said contract. The cross-libellant moved that the proceedings in the original libel be stayed until security was given for the damages claimed in the cross libel. The original libellant contested this motion on the ground that the cross libel was for a demand which could not be entertained in admiralty, since it was merely an action for misrepresentations inducing the conract, and for breaches of said contract. The court granted the motion, stating:

> "The contract in this case being for supplies, is a maritime contract within the ordinary jurisdiction of the admiralty courts. Upon such a contract and all its incidents the rights and remedies of the parties are reciprocal. The contract being maritime, the admiralty, says Curtis, J., in Church vs. Shelton, 2 Curt., 271, 274 'will proceed to inquire in to all its breaches, and all the damages suffered thereby, however peculiar they may be, and whatever issues they involve."

Moreover, it is now well established that admiralty has jurisdiction over an action for contribution or subrogation.

> *The Mariska*, 107 Fed. 989, Circuit Court of Appeals, 7th Circuit;
> *Erie Railroad Co.*, vs. *Erie & Western Transportation Co.*, 204 U. S., 220;
> *The Ira M. Hedges*, 218 U. S., 264.

In the *Ira M. Hedges*, supra, the facts were that the appellant, who was in possession of the tug Slatington under a demise, was towing car float No. 22, and the tug Ira M. Hedges, was towing two scows. One of the scows and the car float collided while thus being towed. The owner of the scow, who was not the owner of the tug Hedges, sued the appellant in possession of the Slatington at common law, and recovered a judgment which was paid. The appellant brought this libel against the Ira M. Hedges, for contribution. The District Court dismissed the libel on the ground of want of jurisdiction. This court on appeal reversed the decree of the District Court, holding that the right to contribution applies to the substantive law of admiralty and is not a mere incident of a form of procedure, and this although the appellant could not have used the appeal at common law because of the familiar rule that there is no contribution between joint tort feasors.

The right to indemnity is similar to the right to contribution, and there seems to be no reason why there should be a distinction drawn between them If admiralty can enforce an action in contribution, as this court has decided, it is submitted that it also has jurisdiction over an action for indemnity. Where, as here the respondent is entitled to an indemnity from the parties sought to be brought in under the petition, the court sitting in admiralty would therefore, it is submitted, have jurisdiction over the action.

The Circuit Court of Appeals for the Second Circuit in *Wilhelmens Dampskibs et al.* vs. *Canadian Venezuelan Co., Ltd.*, et al, 224 Fed., 881, has held that a garnishee in admiralty might set off against

the attached debt a claim not cognizable in an original admiralty suit. It is submitted that there is little, if any, difference between enforcing a non-admiralty demand by way of set off in an admiralty proceeding and passing along an admiralty liability in a similar suit to one who ought to pay and who has an opportunity to be heard.

The wise doctrine that a court of equity should prevent multiplicity of suits and that when once it has taken jurisdiction of the main controversy it should retain the cause for all purposes, even tho it be thereby called upon to determine legal rights otherwise beyond its authority, is a persuasive argument that admiralty jurisdiction exists over the case at bar.

In *McGowan* vs. *Parish*, 237 U. S., pages 285, 296, this court said:

> "The single issue that remained was, of course, of such a nature that it would have been the proper subject of an action at law, had it not originally been bound up with questions appropriate for decision by an equitable tribunal. But 'a court of equity ought to do justice completely, and not by halves'; and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. Camp vs. Boyd, 229 U. S., 530, 551, 552 and cases cited."

In *Camp* vs. *Boyd*, 229 U. S., 530, this court, per Mr. Justice Pitney held that parties in posses-

sion of land under titles from various sources, and having the equitable as well as the legal title to a portion of it, and the equitable but not the legal title to the remainder, may, under the circumstances, properly evoke the aid of equity to restrain other parties from maintaining ejectment suits and to adjudicate the title to the entire tract in a single suit, saying at pages 551, 552:

> "A court of equity ought to do justice completely, and not by halves. Decker vs. Caskey, 1 N. J. Eq., 427, 433; Williams vs. Winans, 22 N. J. Eq., 573, 577; Knight vs. Knight, 2 Eq. Cas. Abr., 169 pl. 25; S. C., 24 Eng. Rep., 1088, 1089; Story Eq. Pl. Sections 72, 174.
>
> One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority. Oelrichs vs. Spain, 15 Wall, 211, 228; Holland vs. Challen, 110 U. S., 15; Reynes vs. Dumont, 130 U. S., 354, 395; Kilbourn vs. Sunderland, 130 U. S., 505, 514; Gormley vs. Clark, 134 U. S., 338, 349. And since there is no question that the equitable title of appellees to the Fennell lot is good, if their equitable title to the Daugherty and Frethy lots is good, we may proceed at once to the question of the effect of the proceedings and decree in the Bickley suit, and the deeds made thereunder, as bearing upon these two lots."

For the reason, therefore, that admiralty has jurisdiction over actions of contribution and indemnity, and since by the allegations of the petition and amended petition of the appellant it is entitled to indemnity from the appellee for the damage set forth in the libel herein, and since the bringing in of the appellee under said petition as a party respondent in this action will avoid circuity of action and minimize and consolidate litigation, and since such practice is in accord with the general rule as laid down in the decisions of the judges of the Southern District of New York, and Admiralty Rule 15 of said District Court, it is submitted that the decree of the District Court herein appealed from should be reversed.

POINT IV.

The decree of the District Court for the Southern District of New York should be reversed with costs.

Respectfully submitted,

HUNT, HILL & BETTS,
Proctors for Appellant.

GEO. WHITEFIELD BETTS, JR.,
GEORGE C. SPRAGUE,
of Counsel.

30178

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.
No. 259.

ONEIDA NAVIGATION CORPORATION, Claimant of the Sailing Vessel "PERCY R. PYNE 2nd", etc.,

Appellant,

against

W. & S. JOB & COMPANY, INC.,

Appellee.

BRIEF FOR APPELLEE.

Statement

This is a direct appeal by the appellant from the Final Decree of the United States District Court for the Southern District of New York entered on the 4th day of November, 1918, under Section 238 of the Judicial Code (Act

of March 3, 1911, 36 Stat. 1087, 1157, ch. 231), involving the question of whether the Exceptions filed to the Petition and Amended Petition filed by the Appellant to bring in the Appellee, W. & S. Job & Company, Inc., as a party defendant under Admiralty Rule 59, were within the Admiralty Jurisdiction of a District Court of the United States.

• • • • •

Three Libels were filed herein—one by William D. Oelbermann and another, co-partners, etc.,-against-Schooner "Percy R. Pyne 2nd", etc. one by James W. Smith and another, doing business etc. against Sailing Vessel "Percy R. Pyne 2nd" etc., and one by William Ellery against Sailing Vessel "Percy R. Pyne 2nd" etc.—to recover damages sustained by shipments of wool on the said Schooner "Percy R. Pyne 2nd" on her homeward voyage from Port Elizabeth, Africa, to Boston, Massachusetts.

The Libel of William D. Oelbermann and another was filed in November, 1917, and the Libel of James W. Smith and another and the Libel of William Ellery were filed in January, 1918.

The Answer of the Oneida Navigation Corporation to the Libel of William D. Oelbermann and another was filed on February 27th, 1918, and its Answer to the Libel of James W. Smith and Another, and its Answer to the Libel of William Ellery, were filed on or about February 26th, 1918; but the said Oneida Navigation Corporation did not file its Petitions to bring in

W. & S. Job & Company, Inc., as a party defendant in said actions until on or about the 11th day of September, 1918.

Although the Libel of James W. Smith and another, as well as the Libel of William Ellery, set forth the unseaworthiness of the said vessel, the Oneida Navigation Corporation, did not immediately file petition to bring in said W. & S. Job & Company, Inc., because said Oneida Navigation Corporation knew that said W. & S. Job & Company, Inc., was not in any way liable or responsible for any damage the said cargo or shipments of wool might have sustained.

Furthermore, the said Oneida Navigation Corporation in its Answers to the said Libels alleges:

> "That whatever damage, if any, was caused to libellants' goods on the voyage was caused by the Acts of God, perils and dangers of the seas or other navigable waters or the inherent defect, quality or vice of the thing carried or insufficiency of package, and that the owner of said vessel exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, and that in accordance with the Act of Congress of February, 1893, known as the Harter Act and the terms of the bills of lading issued for said goods and under the general maritime law, neither the vessel nor her owners are responsible for any of the loss or damage claimed by libellants, and if said loss or damage was caused or

contributed to in any way by any faults or errors in the management or navigation of said vessel, which is not admitted, neither the vessel nor her owners are in any way liable or responsible therefor. That the bills of lading for the bales of wool alleged by libellants to have been damaged contain the following clause:" (R., fol. 10).

It was, therefore, obviously an after thought on the part of the Oneida Navigation Corporation to bring in W. & S. Job & Company, Inc., as a party defendant, to see if it could not in some way hold said W. & S. Job & Company, Inc., liable for said damage to said cargo or shipments of wool, by showing that W. & S. Job & Company, Inc., had entered into an agreement (to which the petitioner was not a party) to build the said Schooner "Percy R. Pyne 2nd", and it was liable for any faulty construction in said vessel.

The Appellee, W. & S. Job & Company, Inc., never entered into any agreement whereby it agreed to indemnify the said Oneida Navigation Corporation or become responsible for any damage cargo might sustain on said schooner after W. & S. Job & Company, Inc., had parted with the title to the said schooner to Anderson T. Herd, who was the first purchaser thereof.

* * * * *

The First, Second, Third and Fourth Exceptions (R., p. 17) filed to the original Petition

of said Oneida Navigation Corporation (R., fols. 18 to 21), and the First, Second and Third Exceptions (p. 20) filed to the Amended Petition of the Oneida Navigation Corporation (fols. 42 and 43), are, in substance, to the effect that the allegations of the said Petitions do not disclose any cause of action in admiralty against W. S. Job Company, Inc., and there is no admiralty or maritime jurisdiction against said W. & S. Job & Company, Inc., herein as clearly shown by the said Petitions, as well as by the Building Contract (fols. 28 to 36; see letter of Job Bros. to R. L. Bean, dated March 21, 1916, fol. 36) between W. & S. Job & Company, Inc. as owner, and R. L. Bean of Camden, Maine, as Builder, and the agreement (fols. 25 to 28) between W. & S. Job & Company, Inc. and Anderson T. Herd, the first purchaser of said schooner from said W. & S. Job & Company, Inc.

The Court's attention is respectfully called to the Sixth Article of the Libel of James W. Smith and Another against the Sailing Vessel "Percy R. Pyne 2nd" (R., fol. 2), and the Sixth Article of the Libel of William Ellery against the same vessel (which has been stipulated to be the same as in the Libel of Smith and Another), which allege that the unseaworthiness of the vessel was due to the fact that she was inadequately and insecurely constructed, and after her construction her strength had been greatly impaired by the cutting away of

her timbers and frame for the installation of an auxiliary engine.

The Sixth Article of the Answer of the Oneida Navigation Corporation as Claimant of said Schooner "Percy R. Pyne 2nd" (R., p. 4, fol. 9) denies the allegations of the said Sixth Article of said Libel (fol. 2).

The Eighth Article of the said Answer of the Oneida Navigation Corporation (fol. 9, p. 4) alleges, as a defense, that the cargo was not damaged by the ship being unseaworthy in her construction, etc., and the installation of her auxiliary engine, but that the damage was caused by perils of the sea; and, in addition, set forth the Harter Act to show that within the terms and conditions thereof the owner of the vessel was not liable for said damage, and quotes extracts from the bills of lading and the charter party to substantiate said defense.

The Petition of the Oneida Navigation Corporation, in Articles Third, Fourth, and Fifth thereof, (fols. 18 to 20) and the Amended Petition of said Oneida Navigation Corporation in Articles Fifth and Ninth thereof (fols. 42 and 43) clearly show that the agreement between W. & S. Job & Company, Inc., and Anderson T. Herd (fols. 25 to 28) and the agreement between W. & S. Job & Company, Inc., and R. L. Bean, of Camden, Maine (fols. 28 to 36), for the building of the said vessel, were purely and simply contracts to build a vessel and launch her, and were not contracts for the transportation of cargoes, and they are not maritime contracts and they are not within the admiralty

and maritime jurisdiction of the United States District Courts.

The Court's attention is also respectfully called to the agreement dated August 30th, 1916, between Anderson T. Herd and W. & S. Job & Company, Inc., and particularly to the Third paragraph (fol. 25, p. 11), which states that the party of the second part (Anderson T. Herd) had seen and examined said contracts and specifications attached thereto, and the said vessel (meaning the contracts for the building of said vessel, between W. & S. Job & Company, Inc., and R. L. Bean).

Subdivision "3" (fol. 26) of said Agreement of August 30th, 1916, gives the said Anderson T. Herd full opportunity to inspect the said vessel during the construction thereof.

Subdivision "7" (fol. 27) of said Agreement reads:

> "7. In the event of any default by either party hereto upon any of the terms and conditions hereof, the rights and remedies and liabilities of the parties shall be as provided by the statutes or common law in the State of New York."

* * * * *

Section 96 of the Personal Property Law—Birdseye Cumming & Gilbert's Consolidated Laws of New York (Vol. 5, 2nd Edition), p. 6237,—reads:

"§ 96. IMPLIED WARRANTIES OF QUALITY.—Subject to the provisions of this article and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

* * * * *

3. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed".

* * * * *

And Subdivision "8" of the said Agreement (fol. 27) reads:

"8. It is understood and agreed by the parties hereto that this agreement and all rights thereunder are to be assigned by the party of the second part to Percy R. Pyne 2nd."

Therefore, said Percy R. Pyne 2nd is bound by the said Subdivisions "3" and "7" of the said agreement.

The Court will readily see that the assignment of the said Agreement was limited to said Percy R. Pyne 2nd, and it could not be assigned to any other party; and, therefore, the appellant, Oneida Navigation Corporation, is not entitled to be subrogated to any rights under said Agreement.

The Court's attention is respectfully called to the Memorandum of Agreement dated March 20, 1916, between R. L. Bean of Camden, Maine,

as Builder, and W. & S. Job & Company, Inc. (fol. 28) for the building of the vessel, and particularly to the clause thereof in reference to "stern fittings for engine" (fol. 34), which provides that if the parties of the second part (Job & Company) decide on fitting stern to accomodate internal combustion engines, which are to be furnished by the parties of the second part at their own expense, it is agreed that the same shall be built by the parties of the first part, etc. It would appear from that clause that at the time the said Agreement for building the vessel was drawn up there must have been some conversation between R. L. Bean, the builder, and W. & S. Job & Company, Inc., the owner, in reference to the installation of an auxiliary engine which would be placed in the stern of the vessel, and that is borne out by the letter dated March 21, 1916, written by W. & S. Job & Company, Inc. to Mr. R. L. Bean, a copy of which is attached to the back of the said Building Contract (see letter at fol. 6). The said contract to build the said vessel is dated the 20th day of March, 1916, (fol. 28), and the said letter requesting the alterations so that the auxiliary engine could be installed is dated the 21st day of March, 1916 (fol. 36), showing clearly that the said engine was to be installed while the vessel was still on the stocks and uncompleted. The said contract, therefore, is purely a building contract and is in no way a maritime contract; and if any damages have accrued—but which our client, W. & S. Job & Company, Inc., the Appellee, denies—they must

be litigated in a common law action to be brought by Anderson T. Herd against W. & S. Job & Company, Inc., and not by the Appellant, Oneida Navigation Corporation; they cannot be litigated in the admiralty courts under the contract to transport a cargo of wool; and W. &. S. Job & Company, Inc., cannot be brought in as party defendant in these actions brought by Smith and Another and William Ellery against the said sailing vessel, for alleged damages sustained under a contract to transport a cargo of wool, or under the charter party between Oneida Navigation Corporation and Arkell & Douglas, Inc. (see Eighth Article of Answer, fol. 10).

The following cases clearly establish that the building of a vessel,—and even the equipping of a vessel, after she has been launched, to make her ready for sea,—is not a maritime contract; it is a contract made on land and must be enforced in common law Courts and not in the Admiralty:

North Pacific Steamship Company v. *Hall Bros. M. R. & S. Co.* 249 U. S., p. 119, at p. 126, and cases cited on p. 127;

The Dredge "A", 217 Fed., 617 at pp. 629-632; and cases cited.

Graham & M. Transportation Co. v. *Craig Shipbuilding Co.*, 203 U. S., 577.

In *The Winnebago*, 205 U. S. 354; 27 Sup. Ct. 509, 51 L. Ed. 836, Mr. Justice Day says:

> "It is next objected that the Court erred because certain items were allowed (by the state court under a state statute) for material furnished the vessel *after she was launched*, and therefore the subject of exclusive jurisdiction. * * * But we agree with the state court that these items were really furnished *for the completion* of the vessel and *were fairly a part of her original construction*. In such a case the remedy was within the jurisdiction of the state court".

In the said Winnebago case, the United States Circuit Court of Appeals for the Sixth Circuit said:

> "A ship launched, but still in the course of construction, does not become subject to the maritime law, because she rests in the water rather than on land, and does not become so until she is put into use as an agency of commerce, or, at least, until she is fitted for that purpose. and she ceases to possess a maritime character when she is permanently withdrawn from such service.—*City of Detroit* v. *Grummond*, 121 Fed. 963, at p. 971, and cases there cited."

In *Cunningham* v. *Hall*, 1 Clifford 43-55 (Circuit Court for Mass., 1858), it was held that a libel in personam by purchasers and owners to recover compensation for damages and expenses

of repairs alleged to have resulted from the non-completion of the ship according to the terms of a written contract could not be maintained in admiralty; the Court has no jurisdiction.

The latest case in this, the Second Circuit, on the question of what is and what is not a maritime contract and where the admiralty courts have and have not jurisdiction is, *The Ada,* 250 Fed., 194, at pp. 195 to 198.

It is respectfully submitted that the Final Decree entered in the United States District Court for the Southern District of New York on the 4th day of November, 1918, sustaining the Exceptions of W. & S. Job & Company, Inc. to the original Petition and the Amended Petition of the Oneida Navigation Corporation, should be affirmed.

All of Which is Respectfully Submitted,

Carter & Carter,
Proctors for the Appellee,
W. & S. Job & Company, Inc.

Peter S. Carter,
Of counsel.

ONEIDA NAVIGATION CORPORATION, CLAIMANT OF THE SAILING VESSEL "PERCY R. PYNE, 2D." &c. *v.* W. & S. JOB & COMPANY, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 259. Argued March 19, 1920.—Decided April 19, 1920.

In a libel of a vessel for damage to cargo due to unseaworthiness, the owner and claimant, having answered denying liability, by leave filed a petition to bring in another party as indemnitor. *Held*, that a decree dismissing such petition was not appealable by the claimant to this court in advance of any determination of the main issue of claimant's liability. A case cannot be brought up piecemeal. *Collins* v. *Miller*, *ante*, 364.

Appeal dismissed.

THE case is stated in the opinion.

Mr. Geo. Whitefield Betts, Jr., with whom *Mr. George C. Sprague* was on the brief, for appellant.

Mr. Peter S. Carter, for appellee, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

James W. Smith and another libelled the Schooner Percy R. Pyne 2d in the District Court of the United States for the Southern District of New York claiming damages for injury to cargo resulting from unseaworthiness due to the cutting away of timbers and frame for the installation of an auxiliary engine. The Oneida Navigation Company claimed the vessel as owner and answered denying liability. Then it filed, by leave of court, a

petition to bring in, under Admiralty Rule 15 of that court in analogy to Admiralty Rule 59 of this court, W. & S. Job & Co., Inc., as defendants, alleging them to be the party through whose fault, if any, the damages complained of had occurred, and that if liability should be established it would be entitled to be indemnified by them. W. & S. Job & Co., Inc., excepted to the petition and denied jurisdiction on the ground that the petition did not set forth a cause of action in admiralty. Their exception was sustained and the petition was dismissed on that ground. The case comes here by direct appeal, the District Judge having certified the question of jurisdiction.

The petition to make W. & S. Job & Co., Inc., party defendants was merely an incident in the progress of the case in the District Court. The liability of indemnitors thereby sought to be enforced would in no event arise unless the vessel should be held liable. The petitioner had as claimant denied liability in its answer to the libel and the issue thus raised had not been tried. While the decree dismissing the petition as to W. & S. Job & Co., Inc., was final as to them, there was no decree disposing of the case below. A case may not be brought here in fragments. This court has jurisdiction under § 238 of the Judicial Code, as under other sections, only from judgments which are both final and complete. *Collins* v. *Miller*, decided by this court March 29, 1920, *ante*, 364; *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262. The case was not ripe for appeal. Although the objection was not raised by the appellee, the appeal is

Dismissed for want of jurisdiction.